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ABSTRACT

Drawing on the research of 18 international experts in education and law, this yearbook presents a review and advocacy-free analysis of litigation involving education during the previous year in the United States, Australia, the United Kingdom, and Europe. But the bulk of the yearbook focuses on education law in the United States. The volume is divided into 14 chapters, each a different topic and each written by a different contributor: (1) "Employees"; (2) "Pupils"; (3) "Bargaining"; (4) "Students with Disabilities"; (5) "Torts"; (6) "Sports"; (7) "Higher Education"; (8) "Students in Higher Education"; (9) "Federal and State Legislation"; (10) "Education-Related Cases"; (11) "International Law: Australia"; (12) "England and Wales: Regulating School Education for Social Inclusion"; (13) "Higher Education in Great Britain"; and (14) "Europe: The International Dimension of Educational Policy." Each chapter contains a short introduction, summaries of important court cases, analyses of legal precedents set by important court cases, and a brief conclusion. Appended are a subject index, an index of cases, and lists of cases by jurisdiction in the United States, the United Kingdom, and Australia. (WFA)

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THE YEARBOOK OF EDUCATION LAW 2002

CHARLES J. RUSSO

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THE YEARBOOK OF EDUCATION LAW

2002

EDITED BY
CHARLES J. RUSSO
UNIVERSITY OF DAYTON

EDUCATION LAW ASSOCIATION
DAYTON, OHIO

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PREFACE

Thirty years ago, in 1972, the Education Law Association (ELA), formerly the National Organization on Legal Problems of Education (NOLPE), became publisher of *The Yearbook of Education Law (The Yearbook). The Yearbook* traces its history to 1933 at which time it was published by the Interstate Printers and Publishers.

The Yearbook provides administrators in K-12 and higher education, attorneys, faculty members in higher education, and other interested readers with a comprehensive review and advocacy-free analysis of litigation involving education during the previous year. As in past years, this edition of *The Yearbook* includes chapters addressing a wide array of issues involving education law. Aware of growing interest in international and comparative developments, since 1999 *The Yearbook* has included contributions from jurisdictions other than the United States. In addition to their citations in West's Federal and Regional State Reporters, cases reviewed in *The Yearbook* include citations to the West's *Education Law Reporter,* a valuable source of information for all individuals who are interested in Education Law.

Over the past thirty years, many people have contributed their time and efforts to the *The Yearbook*. Thus, the purpose of this brief Preface is to acknowledge, and thank, the many contributors and staff members who have helped to make *The Yearbook* a success.

The Editors of *The Yearbook* have been Leroy J. Peterson (1972), Robert E. Phay (1973), Floyd G. Delon (1974), Philip K. Piele (1975-1984), and Stephen B. Thomas (1986-1994), Charles J. Russo (1995 to present).

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Any undertaking the size of *The Yearbook* requires a great deal of assistance from many people. To this end, rather than run the risk of offending anyone by inadvertently omitting a name, I would like to extend a special note of thanks to all past ELA/NOLPE Executive Directors and staff who have helped to make *The Yearbook* a success. At the same time, I would like to express particular thanks to our Executive Director Mandy Bingaman and Publications Manager Megan Williams, who completes a final edit and lays out the chapters as well as to our Administrative Assistant Kathleen Vacek and Account Manager Judy Pleiman who help with *The Yearbook* in many ways. The assistance of our outstanding staff helps to make my job easier.

I would also like to Ms. Cynthia Paolo Fraga and Ms. Elizabeth Pearn of the University of Dayton for their gracious assistance in preparing this list of authors and co-authors. Finally, I would like to extend my most special thanks to my wife, Debbie Russo, for all of the time and effort that she has spent over the years in completing cite checks for *The Yearbook*.

On behalf of ELA, we would like to take this opportunity to thank our readers who, we hope, will continue to find *The Yearbook* a valuable resource.

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Editor, *The Yearbook of Education Law*

1

EMPLOYEES

Ralph D. Mawdsley

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Introduction

This year's chapter reviews about 170 cases involving employees in public and nonpublic K-12 schools. The Supreme Court resolved one case involving K-12 gender discrimination. This chapter, which cites past Supreme Court cases that provide important precedent for the lower courts, excludes litigation focusing primarily on procedural matters. As in past years, the section with the largest number of cases concerns dismissal, nonrenewal, demotion, and discipline along with school board compliance with district and state policies.

Discrimination in Employment

Discrimination claims can arise under state or federal statutes. Even so, most suits identifying state law as a claim also invoke federal law, if for no other reason than because states tend to follow federal law in interpreting their own antidiscrimination laws. However, states may also act under their own statutes to protect categories that may be the same or different from those under federal law.

Federal nondiscrimination statutes generally are divided into two broad groups: those prohibiting discrimination in employment and those forbidding discrimination in educational institutions receiving federal assistance. The employment statutes include Title VII of the Civil Rights Act of 1964,[1] which prohibits discrimination on the basis of race, color, religion, sex, and/or national origin; the Age Discrimination in Employment Act of 1967 (ADEA),[2] which prohibits discrimination against persons forty years of age or older; the Americans with Disabilities Act of 1990 (ADA),[3] which prohibits employment discrimination on the basis of disabilities by state and local governments and in public accommodations; and the Family and Medical Leave Act (FMLA),[4] which affords employees the right to extended leave for personal and family medical needs and illnesses.

Statutes requiring the reception of federal assistance include the Rehabilitation Act of 1973 (section 504),[5] which prohibits discrimination on the basis of disabilities; Title IX of the Educational Amendments of 1972,[6] which prohibits gender discrimination; and Title VI of the Civil Rights Act of 1964,[7] which prohibits discrimination on the basis of race, color, or national origin.

Remedies for discrimination can also be pursued under two other federal statutes that can apply to both employment and nonemployment situations.

---

[1] 42 U.S.C. § 2000 *et seq.*
[2] 29 U.S.C. § 621 *et seq.*
[3] 42 U.S.C. § 12101 *et seq.*
[4] 29 U.S.C. § 2611 et *seq.*
[5] 29 U.S.C. § 794.
[6] 29 U.S.C. § 1681 *et seq.*
[7] 42 U.S.C. § 2000d.

Section 1981 of the Civil Rights Act of 1866[8] prohibits discrimination on the basis of national origin and race in the making of contracts. Section 1983 of the Civil Rights Act of 1871,[9] which contains no discriminatory categories of its own, is a vehicle for seeking damages for violations of federal constitutional and statutory rights.

Discrimination can involve rights not protected under federal law. The Seventh Circuit upheld the constitutionality of a school board's extended spousal health plan that limited benefits to partners of the same sex. Here, a female employee who lived with a man for more than two decades but never married him challenged the plan under equal protection and due process. In affirming a trial court's motion to dismiss the complaint, the Seventh Circuit court reasoned that the board's rationale for tolerating or endorsing same-sex partners was a political question and not one for the courts. In response to the plaintiff's claim that heterosexual partners should receive the same benefits as married ones, the court was of the opinion that "the refusal to extend domestic-partner benefits to heterosexual cohabitors could be justified on the basis of the policy favoring marriage for heterosexuals quite apart from the reasons for wanting to extend the spousal fringe benefits to homosexual couples."[10]

In a case of first impression involving a transgendered teacher in Minnesota, the federal trial court ruled that permitting the plaintiff, who transitioned from male to female, to use the faculty women's restroom did not create a hostile environment for another teacher who objected to sharing a restroom with the transgendered teacher.[11] The court noted that the objecting teacher was free to use other restrooms in the building, and, in any case, this did not pervasively and severely affect a term, condition, or privilege of employment.

Courts tend to protect the right to bring discrimination claims. The Sixth Circuit reversed a trial court's dismissal, with prejudice, of a discrimination complaint from Michigan.[12] The court found that the dismissal unreasonably punished a former teacher where the failure to act in a timely manner was the fault of his attorney. The court asserted that the sanction of dismissal was appropriate only if an attorney's actions amounted to failure to prosecute and no alternative would have protected the integrity of the pretrial process.

Race

According to a federal trial court in Arkansas, race hostile environment claims can be brought against individuals in their official capacities but only if such persons exercised requisite administrative control over a school board's programs and activities.[13] As such, the court concluded that board members and the district superintendent could be sued but the state department of education could not be joined in the action.

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[8] 42 U.S.C. § 1981.

[9] 42 U.S.C. § 1983.

[10] Irizarry v. Bd. of Educ. of Chi., 251 F.3d 604, 608 [154 Educ. L. Rep. 119] (7th Cir. 2001).

[11] Cruzan v. Minneapolis Pub. Sch. Sys., 165 F. Supp. 2d 964 [157 Educ. L. Rep. 736] (D. Minn. 2001).

[12] Mulbah v. Detroit Bd. of Educ., 261 F.3d 586 [156 Educ. L. Rep. 484] (6th Cir. 2001).

Courts can be reluctant to grant summary judgment in race discrimination cases. In Ohio, a federal trial court refused to grant summary judgment to a black female assistant principal's claim that her lateral transfer to the same position at another middle school violated title VII.[14] While lateral transfers frequently are not adverse employment decisions, the court contended that they can be, as perhaps in this case, where the new school was not as prestigious and the assistant principal would not have had as many duties because the school was not as large.

In a case from Alabama, a federal trial court denied a motion for summary judgment entered on behalf of a principal and superintendent who were parties to the reversal of a search committee's recommendation of a black teacher as head basketball coach.[15] The court declared that nonselection constitutes an adverse employment action and that, at trial, the plaintiff would have the opportunity to produce evidence that the principal retaliated for filing suit against the school board and the superintendent.

At trial, a plaintiff must produce evidence that a person of another race was treated differently due to race. Where a black laborer was not promoted, a federal trial court in Alabama was not convinced that he proved his discrimination claim. The court was of the view that the disparity in qualifications between the plaintiff and a white applicant was not significant enough as to leave no reasonable basis for the selection. Even though the white applicant who was selected for a job did not have the requisite five years of experience that the plaintiff had, the court commented that an employer can have a practice of hiring staff who do not meet all of its posted criteria. The court indicated that "[e]mployers have the freedom to make unwise, unsound, or even irrational decisions, and courts do not sit as super-personnel boards."[16]

The Eleventh Circuit reversed a trial court judgment that a black employee in Florida who was discharged for a lewd assault on a child in 1979 was discriminated against because a white employee with a similar charge in 1977 had not been dismissed.[17] In reversing back and front awards for the plaintiff, the court offered that the black employee was not similarly situated to his white counterpart. The court pointed out that in addition to the lewd assault, the plaintiff's record included three arrests for battery and aggravated assault and that the most recent charge was still pending when the board voted to dismiss the employee. The court acknowledged that since the frequency and violent nature of plaintiff's conduct distinguished him from the white employee, it afforded the board a nondiscriminatory basis for firing the black, but not the white, employee.

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[13] Steel v. Alma Pub. Sch. Dist., 162 F. Supp.2d 1083 [157 Educ. L. Rep. 613] (W.D. Ark. 2001).

[14] Black v. Columbus Pub. Schs., 124 F.3d 550 [150 Educ. L. Rep. 114] (S.D. Ohio 2000).

[15] Hamilton v. Montgomery County Bd. of Educ., 122 F. Supp.2d 1273 [149 Educ. L. Rep. 495] (M.D. Ala. 2000).

[16] Tarrance v. Montgomery County Bd. of Educ., 157 F. Supp.2d 1261, 1263 [156 Educ. L. Rep. 875] (M.D. Ala. 2001).

[17] Silvera v. Orange County Sch. Bd., 244 F.3d 1253 [152 Educ. L. Rep. 75] (11th Cir. 2001).

The Seventh Circuit sustained a school board in Illinois' elimination of a black teacher's position since it was not convinced that the board had to hire him at another school insofar as his presence would have violated a federal consent decree's faculty integration guidelines.[18] The court explained that the teacher presented no evidence that the board allowed teachers of another race to work at schools where their presence would have contributed to a racial imbalance.

In a case involving reverse discrimination, a white woman who was dismissed from her position as art teacher and head of her department at a high school in Chicago prevailed in a jury trial. A federal trial court in Illinois decided that the teacher was entitled to a permanent injunction against discrimination or retaliation.[19] In refusing to disturb a jury verdict, the court wrote that the board's letter mentioning "reculturing" did not permit it to introduce a videotape of a university professor regarding the meaning of the word "reculture" because what was important was the cultural meaning that the board, rather than the professor, applied to the term.

As reflected by a case from Maryland, employment discrimination claims must involve adverse actions. A black choral teacher unsuccessfully brought a title VII claim of race harassment against a school's white principal and assistant principal. Among the plaintiff's allegations against the principal were the requirement of a doctor's note when he was absent from a professional day, a complaint about a religious text in his music, locking a security door that was convenient for his entering the school, and inadequate support for his discipline problems. In granting the board's motion for summary judgment, the federal trial court ascertained that these events did not constitute ultimate employment matters actionable under title VII because they did not involve adverse actions about hiring, granting leave, discharging, promoting, or compensating.[20]

Sex

The largest number of discrimination claims involving gender arose under the federal constitution, title VII, and state statutes. A supervisor of environmental and support services in Colorado failed to make out an Equal Protection claim when he was investigated for alleged sexual harassment. In affirming a grant of summary judgment in favor of the school board, the

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[18] Greer v. Bd. of Educ. of Chi., 267 F.3d 723 [157 Educ. L. Rep. 555] (7th Cir. 2001).

[19] Mohr v. Chi. Sch. Reform Bd. of Trs. of the Bd. of Chi., 155 F. Supp.2d 923 [156 Educ. L. Rep. 534] (N.D. Ill. 2001).

[20] Nichols v. Caroline County Bd. of Educ., 123 F. Supp.2d 320 [149 Educ. L. Rep. 533] (D. Md. 2000).

Tenth Circuit posited that in order to be the victim of selective, purposeful discrimination by board officials who allegedly harbored animosity against him, the plaintiff would have had to produce evidence that they singled him out for prosecution due to some past animosity.[21]

Gender-based comments can be used to help prove a discrimination claim. A female school administrator in North Dakota presented sufficient evidence of a title VII equal pay violation to withstand the board's motion for summary judgment. In reversing a grant of summary judgment that had been entered on behalf of the board, the Eighth Circuit observed that the board president's alleged statements, such as "a woman can't handle [her administrator's job]," and she was "a woman in a man's job," were sufficiently direct evidence to support an inference of improper motivation.[22] In addition, the court agreed that the plaintiff's being paid $37,000 in her last year on the job while her male replacement earned $61,000 raised an inference that her lower salary was related to gender.

The Supreme Court, in *Clark County School District v. Breeden*, held that a single incident of alleged sexual harassment could not be the basis for a retaliation claim. The incident involved a statement made by a male supervisor while the plaintiff and two male supervisors reviewed the psychological evaluation reports of four job applicants. One of the supervisors made a comment to a coworker (not the plaintiff) that "I hear making love to her is like making love to the Grand Canyon." When one of the supervisors looked at the plaintiff and said, "I don't know what that means," the second supervisor responded, "Well, I'll tell you later," and both chuckled. The plaintiff alleged that she was punished for complaining about the comment in a report to the offending employee and the three higher level supervisors. In reversing the Ninth Circuit's decision on behalf of the plaintiff, the Court, in a per curiam opinion, stated that "no reasonable person could have believed that the single incident recounted above violated title VII's standard."[23]

In order to be viable under title VII, sex discrimination claims must allege events that are sexual in nature. Thus, a federal trial court in Illinois decreed that a female teacher who alleged that a male principal and security officer assaulted her by grabbing and twisting her wrist and shoving a piece of paper in her eye had not raised a sexual harassment claim.[24]

Discrimination claims under title VII must be brought within 300 days. Even so, questions arise as to when the statute of limitations begins to run. In Louisiana, an appellate court maintained that a gender discrimination claim filed 363 days after an assistant principal resigned could go to trial. In reversing a trial court decision that the plaintiff's letter of resignation had to be backdated to when she offered to tend her resignation, beyond the 300 days, the court determined that the critical date was when the resignation was actually offered (within the 300 days).[25] Conversely, a federal trial court in New York rejected a teacher aide's title VII sexual harassment claim when some of the claimed misconduct was beyond the 300-day statute of limitations and three alleged violations were not recurring.[26] The court refused to use a continuing violation exception to title VII, not only because the Second Circuit disfavors this exception, but also because the school board did not have a policy of discriminating.

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[21] Bartell v. Aurora Pub. Schs., 263 F.2d 1143 [156 Educ. L. Rep. 821] (10th Cir. 2001).

[22] Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210 [154 Educ. L. Rep. 452] (8th Cir. 2001).

[23] 121 S. Ct. 1508, 1510 [152 Educ. L. Rep. 492] (2000).

[24] Howard-Ahmad v. Chi. Sch. Reform Bd., 161 F. Supp.2d 857 [157 Educ. L. Rep. 588] (N.D. Ill. 2001).

As seen in a case from Wisconsin, hostile working conditions can be the basis for a title VII claim where a female school custodian stated a title VII prima facie claim for sexual harassment even though she had not been disciplined, demoted, or dismissed; was not denied wages or employee benefit increases or given less opportunity for such increases; did not have her job responsibilities reduced; and was not made to perform menial tasks. The Seventh Circuit, in reversing a grant of summary judgment in favor of the board, remarked that the custodian presented sufficient facts to suggest that a supervisor's conduct subjectively and objectively created a hostile working environment.[27] The court discerned that even if the board had a right to impose extra duties on the custodian by virtue of a collective bargaining agreement, title VII did not permit it to increase her workload due to her sex.

Gender discrimination claims can be brought under state laws. A federal trial court dismissed a gender discrimination claim filed by a female administrator under New York's Human Rights Law because it was not filed within the statute of limitations. The court reflected that the law requires a person who seeks to enforce a private right against a school board to provide notice within three months after the claim accrues.[28] However, since the plaintiff, who alleged constructive discharge on April 15, 1994, did not file her title VII claim with the EEOC until August 15, the court conceded that even if this filing had constituted notice, it did not occur within the ninety-day statutory requirement.[29] In a second case arising under the same statute, another federal trial court in New York believed that a teacher presented a claim against her board for retaliation after she filed a harassment charge against her supervisor. The court agreed that the teacher's claims of reduction in job responsibilities, ostracism, and prevention of chaperoning a field trip were sufficient to demonstrate an adverse employment action. In denying the board's motion for summary judgment, the court afforded the teacher the opportunity to demonstrate at trial that school officials aided and abetted the retaliation by not adequately investigating the harassment claim.

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[25] Buck v. Vermilion Parish Sch. Bd., 783 So.2d 583 [153 Educ. L. Rep. 1003] (La. Ct. App. 2001).

[26] Beattie v. Farnsworth Middle Sch., 143 F. Supp.2d 220 [155 Educ. L. Rep. 161] (N.D.N.Y. 1998).

[27] Haugerud v. Amery Sch. Dist., 259 F.3d 678 [156 Educ. L. Rep. 21] (7th Cir. 2001).

[28] Biggers v. Brookhaven-Comsewogue Union Free Pub. Dist., 127 F. Supp.2d 452 [150 Educ. L. Rep. 704] (S.D.N.Y. 2001).

[29] Beattie v. Guilderland Cent. Sch. Dist., 124 F. Supp.2d 802 [150 Educ. L. Rep. 187] (N.D.N.Y. 2000).

In a case of first impression, an appellate court in Michigan ruled that a counselor's former intimate relationship with her supervisor could form the basis for a cognizable claim under the state's Civil Rights Act. Here, the counselor's supervisor had a relationship with another employee who, along with him, targeted her with persistent and hostile communications as well as other adverse actions. In reversing a trial court's grant of summary judgment in favor of the school board, the court noted that the plaintiff could have been discharged "because of her 'submission' to [the supervisor's] prior romantic/sexual advances."[30]

Questions can arise as to whether a person's treatment is based on reasons other than gender. A federal trial court in Michigan was of the opinion that a female applicant for a boys' varsity basketball head coach position proffered a prima facie case under title VII when a male coach with less experience was selected for the position.[31] The court pointed that the female was already head coach of the girls' basketball team and that the school board chose not to hire her for the boys' position because of overlapping schedules. In denying the school board's motion for summary judgment, the court concluded that a genuine issue of material fact existed as to whether the board had, in fact, established a policy of not permitting the same person to coach two varsity sports with overlapping seasons.

An appellate court in Michigan affirmed that a school custodian who was denied favored work status after she became pregnant was not discriminated against because of her sex.[32] The court asserted that the cause was the custodian's own physician-imposed job restrictions that would have made it unreasonable for her to have continued working while attempting tasks that would have been harmful to her pregnancy.

Age

As in any discrimination claim, a plaintiff must present a prima facie case. The Seventh Circuit affirmed that a teacher in Illinois who was hired at age forty-eight and tenured at age fifty failed to state a prima facie case under the ADEA.[33] Even though the teacher was excluded from activities in which younger colleagues participated, the court declared that the school board's employment practices did not demonstrate an intent to violate ADEA. The court explained that the board hired teachers who were over forty years of age (more than 55 percent of its teachers were within the protected age category), afforded such teachers mentoring opportunities and, in fact, hired plaintiff at age forty-eight.

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[30] Corley v. Detroit Bd. of Educ., 632 N.W.2d 147, 153 [156 Educ. L. Rep. 314] (Mich. Ct. App. 2001).

[31] Fuhr v. Sch. Dist. of Hazel Park, 131 F. Supp.2d 947 [151 Educ. L. Rep. 854] (E.D. Mich. 2001).

[32] Cunningham v. Dearborn Bd. of Educ., 633 N.W.2d 481 [156 Educ. L. Rep. 1387] (Mich. Ct. App. 2001).

[33] Horwitz v. Bd. of Educ. of AVOCA Sch. Dist. No. 37, 260 F.3d 602 [156 Educ. L. Rep. 116] (7th Cir. 2001).

In Indiana, a federal trial court upheld a school board's refusal to promote a black female over the age of sixty from a position as dean to a job as a vice principal.[34] The court was of the view that the administrative panel that recommended a twenty-eight-year-old white male for the position was comprised of persons sharing the plaintiff's age, race, and gender. Even though an arbitrator subsequently found that the person was not qualified, the court added that the plaintiff failed to sustain a prima facie case because statistical evidence, as indicated by the membership of the selection committee, did not support an inference of discrimination. Similarly, a federal trial court in Illinois granted a school board's motion for summary judgment where officials failed to hire a female teacher for a full-time position.[35] The court agreed that the teacher was not qualified for the home economics position for which she had applied.

In a case involving both age and gender discrimination, the Second Circuit reversed a grant of summary judgment in favor of a school board in Connecticut that hired a forty-two-year-old female, rather than a sixty-four-year-old male applicant for a job as a part-time art teacher.[36] In a disparate treatment claim under ADEA, the court acknowledged that the board could base its employment action on objective factors related to the applicants' performances during the job interview. Where the board overlooked the plaintiff's superior paper credentials and the chosen applicant's failure to qualify technically for the job, the court reasoned that this discrepancy furnished sufficient circumstantial evidence from which a jury might infer discriminatory intent.

Once a defendant produces a nondiscriminatory reason for an employment action, the burden shifts to the plaintiff to produce evidence of pretext. In New York, a federal trial court rejected an assistant principal's claim that she was not selected for a job as principal in retaliation for an earlier allegation of age discrimination.[37] The court, in granting the school board's motion for summary judgment, wrote that the board's evidence of the better qualifications of the person selected and concern about the plaintiff's writing skills and knowledge of school curriculum rebutted her prima facie case.

Evidence of animus entitles a plaintiff to a burden-shifting instruction. The Second Circuit applied the burden-shifting jury instruction from *Price Waterhouse v. Hopkins*[38] with regard to a fifty-four-year-old African American woman from New York who was reassigned from a principalship to an assistant principalship. In reversing a judgment that had been entered on behalf of the school board following a jury verdict, the court indicated that the burden-shifting instruction was required since the plaintiff produced evidence of discriminatory animus. The court declared that the superintendent's twice having told the plaintiff that he wanted to hire someone "younger and cheaper" was sufficient to require the burden-shifting instruction whereby the board had the burden of showing, by a preponderance of the evidence, "that it would have demoted [the plaintiff] even in the absence of discrimination."[39]

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[34] Fortenberry v. Bd. of Sch. Trs., 149 F. Supp.2d 542 [155 Educ. L. Rep. 401] (N.D. Ind. 2000).

[35] Hudson v. W. Harvey/Dixmoor Sch. Dist. No. 147, 168 F. Supp.2d 851 [158 Educ. L. Rep. 358] (N.D. Ill. 2001).

[36] Byrnie v. Town of Cromwell, 243 F.3d 93 [151 Educ. L. Rep. 776] (2d Cir. 2001).

[37] Wolf v. Bd. of Educ. of N.Y., 162 F. Supp.2d 192 [157 Educ. L. Rep. 129] (S.D.N.Y. 2001).

[38] 490 U.S. 228 (1989).

Age discrimination claims can result from early retirement offers. A federal trial court in New York was convinced that a provision in a collective bargaining agreement governing sick leave accumulation violated ADEA. The provision offered greater incentives, in terms of percentage of accumulated sick leave that would be paid, to those who retired at an optional age under the age sixty, while those retiring at a higher age would have received proportionally less money. The court contended that a retirement plan which "encourages premature departure from employment by older workers [is] in conflict with ADEA's stated purpose to prohibit age discrimination in employment."[40]

The federal trial court in Puerto Rico refused to permit charges of employment discrimination under the ADEA and violations of title VII and section 1981 filed by a teacher/guidance counselor to proceed against the Department of Education since he had already received a final judgment against it for $237,000 under the same statutes. The First Circuit affirmed that the claims were barred by res judicata.[41]

National Origin

A federal trial court in New York permitted a class action title VII suit by Latino and African American teachers, alleging that their school board's requirement that they pass one of two teacher tests to keep their teaching licenses was discriminatory, to proceed.[42] The plaintiffs alleged that the tests, which were designed to assess teaching program applicants, had a severe and disparate impact on minorities. The court posited that the plaintiffs satisfied all of the requirements for class action certification.

In an especially interesting title VII claim by a former Spanish teacher alleging same-sex harassment, national origin discrimination, and retaliatory discharge, a federal trial court in North Carolina not only granted a school board's motion for summary judgment, but also dismissed the complaint with prejudice.[43] The court found that none of the teacher's claims met the prima facie requirements for same-sex harassment in *Oncale v. Sundowner Offshore Services*,[44] national origin discrimination in *McDonnell Douglas Corp. v. Green*,[45] or retaliation in *Price Waterhouse v. Hopkins*.[46]

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[39] Rose v. N.Y. City Bd. of Educ., 257 F.3d 156, 160 [155 Educ. L. Rep. 1011] (2d Cir. 2001).

[40] O'Brien v. Bd. of Educ. of Deer Park Union Free Sch. Dist., 127 F. Supp.2d 342, 347 [150 Educ. L. Rep. 691] (E.D.N.Y. 2001).

[41] Havercombe v. Dep't of Educ. of P.R., 250 F.3d 1 [153 Educ. L. Rep. 876] (1st Cir. 2001).

[42] Gulino v. Bd. of Educ. of City Dist. of N.Y., 201 F.R.D. 326 [155 Educ. L. Rep. 1183] (S.D.N.Y. 2001).

Disability

The Ninth Circuit upheld a $237,000 jury award for a former school groundskeeper in Arizona on the basis that the school board regarded her as disabled when it refused to rehire her after she resigned.[47] The groundskeeper's attorney convinced a jury that, following a serious on-the-job injury to her leg, and after seven months of surgery and therapy, the board's director of employment refused to permit her to return without a full release from her doctor. The groundskeeper eventually resigned but, after she received a full release three weeks later, the director refused to hire her for any vacant positions. The court decreed that the board's refusal to permit the groundskeeper to return to work and refusal to rehire her were based on the director's having regarded her as disabled and unable to perform any job.

In a disability claim, a plaintiff must produce evidence that the disability interferes with a life function. In affirming a grant of summary judgment for a school board, an appellate court in New York rejected the claim of a teacher who had cancer surgery.[48] The court stated that, based on letters from the teacher's physician, the surgeries did not substantially limit her ability to work. The court also agreed that the administrator's refusal to grant the teacher's request for a modification in her schedule or for a transfer were not adverse employment actions but were permissible refusals to change the terms and conditions of her employment. On the other hand, a school board's refusal to reinstate a custodian who was treated for back problems and released by his doctors to work with limitations regarding lifting was a form of disability discrimination under state law. In reversing an earlier judgment in favor of the board, the Supreme Court of Montana explained that since the custodian claimed that he could perform the functions of his job, the board's action was an unlawful perception of a disability.[49]

The federal trial court in Connecticut granted a school board's motion for summary judgment over whether a former employee with carpal tunnel syndrome had an ADA claim.[50] The court agreed with the board that the employee's condition did not substantially limit a major life activity at work because, although she could not type the thirty-words-per-minute required by some staff for comparable positions, she was able to perform the necessary job duties of any position of employment that the board offered. The court observed that since the plaintiff could not prove that she was unable to perform a broad range of manual tasks, her ADA claim failed.

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[43] Suarez v. Charlotte-Mecklenburg Schs., 123 F. Supp. 2d 883 [149 Educ. L. Rep. 759] (W.D.N.C. 2000).

[44] 523 U.S. 75 (1998).

[45] 411 U.S. 792 (1973).

[46] 490 U.S. 228 (1989).

[47] Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222 [154 Educ. L. Rep. 461] (9th Cir. 2001).

[48] Sirota v. N.Y. City Bd. of Educ., 725 N.Y.S.2d 332 [154 Educ. L. Rep. 263] (N.Y. App. Div. 2001).

[49] Butterfield v. Sidney Pub. Schs., 32 P.3d 1243 [157 Educ. L. Rep. 929] (Mont. 2001).

An appellate court in Ohio affirmed the state retirement board's denial of a librarian's claim for disability retirement benefits due to an alleged chemical sensitivity.[51] The court held that since a difference of opinion existed between physicians for the teacher and the board, the latter had the responsibility of weighing medical evidence and determining eligibility.

According to the federal trial court in Oregon, a former administrator's failure to appeal an administrative board's denial of his ADA claim did not preclude his later filing suit under the FMLA.[52] The court ascertained both that the facts between the two claims were different and that a material issue of fact existed as to whether the administrator was dismissed for insisting on receiving paid medical leave instead of drawing worker's compensation.

In Puerto Rico, the federal trial court agreed that a former teacher proffered sufficient facts to sustain a retaliation claim against his school board under the ADA.[53] The teacher, who had an obsessive-compulsive disorder, alleged that he requested a reasonable accommodation in April 1999, filed an EEOC charge in May, and was discharged in December 1999. The court decided that the teacher established a causal connection between his discharge and the protected conduct of filing the EEOC claim by averring that the board brought dismissal charges against him after he filed the claim.

Substantive Constitutional Rights

This section addresses rights protected under the First (speech, association, and religion), Fourth (privacy), and Fourteenth (substantive due process) Amendments. These rights affect the kind of rules that the government can make in limiting conduct by its citizens.

Speech

A school board is not liable for alleged free speech violations if its members lacked knowledge of an alleged transgression. In such a case, the Fifth Circuit upheld the dismissal of a school secretary in Mississippi over her allegation that her contract was not renewed due to her opposition to the reelection of the incumbent superintendent.[54] The court believed that, even if the secretary's principal and superintendent knew of her exercise of right to free speech, she did not present evidence that the board, the final decision maker, was aware of the protected activity. In any event, the court did not think that the board could be liable since it would have dismissed the secretary for other reasons.

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[50] Cutler v. Hamden Bd. of Educ., 150 F. Supp.2d 356 [155 Educ. L. Rep. 525] (D. Conn. 2001).

[51] State *ex rel.* Peaspanen v. Ohio State Teachers Ret. Bd., 757 N.E.2d 826 [158 Educ. L. Rep. 445] (Ohio Ct. App. 2001).

[52] Bourgo v. Canby Sch. Dist., 167 F. Supp.2d 1173 [158 Educ. L. Rep. 314] (D. Or. 2001).

[53] Castro Ortiz v. Fajardo, 133 F. Supp.2d 143 [152 Educ. L. Rep. 120] (D. P.R. 2001).

School boards can be liable for retaliation. In a case of first impression from New Jersey, the Third Circuit determined that the elimination of two jobs as part of a reduction in a school was an official policy or practice for purposes of section 1983 liability.[55] In reversing an earlier order and remanding the dispute for trial, the court offered that the employees presented a claim for free speech retaliation based on their vocal opposition to the mayor and members of the city council in past elections. The court maintained that, when the mayor and city council approved a school budget beyond the budget cap, they would have had to prove that their defunding of the plaintiffs' jobs was part of a budget allocation rather than retaliation for past speech.

In a second case from New Jersey, the federal trial court granted a motion for summary judgment entered by a superintendent, principal, and music department head after a band teacher's contract was not renewed.[56] The court ruled that an investigation of parental complaints about the teacher's treatment of their son was consistent with board policies and not in retaliation for his complaints about grievances with the principal and department head. The court remarked that the teacher's complaints were not entitled to free speech protection since they concerned personal employment rather than a desire to expose errant school policies or malfeasance.

The federal trial court in Delaware was satisfied that the former chief financial officer of a school board presented claims under both free speech and the state's whistleblower statute.[57] In denying the school board's motion for summary judgment, the court noted that a school official not involved in policymaking decisions retains free speech protections against retaliation for his statements to the state auditor over improper expenditures of district funds. The court recognized that, while the plaintiff's refusal to disclose the content of his conversation with the state auditor to district officials might have created an atmosphere of distrust and disharmony that countered his free speech claim, such a defense would have to be tested at trial.

As reflected by a case from New Mexico, not all administrative actions are considered retaliation. A teacher who resigned alleged that she was constructively discharged for actions on behalf of union members who pursued grievances. In affirming the dismissal of the teacher's free speech retaliation claim, the Tenth Circuit judged that her principal's placing her on a professional development plan to nurture collaboration among colleagues and requiring her to meet weekly with the principal were not adverse employment actions. The court concluded that since the facts presented a claim "of insufficient gravity to premise a First Amendment violation,"[58] it never had to consider whether the teacher's union activity was a matter of public concern.

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[54] Beattie v. Madison County Sch. Dist., 254 F.3d 595 [155 Educ. L. Rep. 40] (5th Cir. 2001).

[55] Langford v. City of Atlantic City, 235 F.3d 845 [150 Educ. L. Rep. 27] (3d Cir. 2000).

[56] Kadetsky v. Egg Harbor Township Bd. of Educ., 164 F. Supp.2d 425 [157 Educ. L. Rep. 664] (D.N.J. 2001).

[57] Hauge v. Brandywine Sch. Dist., 131 F. Supp.2d 573 [151 Educ. L. Rep. 822] (D. Del. 2001).

Speaking on matters of public concern may not protect an employee if the speech is disruptive. A middle school principal in Arkansas, who lowered the evaluations of three teachers who complained over four years about the proper care and education of special education students, was entitled to qualified immunity against the their free speech claims. Even though the teachers had spoken out on a matter of public concern, the Eighth Circuit was of the view that their repeated confrontations with other teachers caused workplace turmoil. The court contended "that the teachers' interest in speaking on these matters was outweighed by the interest of efficient administration of the middle school."[59]

A federal trial court in New York upheld the dismissal of an assistant superintendent for his negative comments about school district administrators, including the interim superintendent, at board meetings. The assistant superintendent, who was in charge of curriculum and instruction, criticized the administration for not providing leadership to teachers and principals in the areas of curriculum and instruction. The court balanced the assistant superintendent's free speech rights to speak on matters of public concern with the board's interest in promoting public services through its employees. The court reflected that the "[p]laintiff chose to criticize School District administrators in a manner that ran counter to his job description and undermined the ability of the administration as a whole to carry out its responsibilities."[60]

School district policies or state statutes that punish verbal behavior may run afoul of the Free Speech Clause. In a case with significant precedential importance, the Third Circuit struck down the antiharassment policy of a school board in Pennsylvania. In reversing a grant of summary judgment that had been entered on behalf of the board, the court found that the policy, which banned—at a minimum—verbal or physical conduct that had the purpose or effect of interfering with a student's educational performance or creating an intimidating hostile or offensive environment, was unconstitutionally overbroad under the Free Speech Clause. The court asserted that the policy was unacceptable since it was not limited to prohibiting vulgar or lewd speech under *Bethel School District v. Fraser*,[61] to controlling school-sponsored speech under *Hazelwood School District v. Kuhlmeier*,[62] or speech likely to result in substantial disruption under *Tinker v. Des Moines Independent School District*.[63] The court acknowledged that the policy included some categories under federal antidiscrimination laws as well as some that were not, but in both cases the court emphasized that the judiciary has "never embraced a categorical harassment exception from First Amendment protection."[64]

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[58] Lybrook v. Members of Farmington Mun. Schs. Bd. of Educ., 232 F.3d 1334, 1341 [149 Educ. L. Rep. 328] (10th Cir. 2000).

[59] Fales v. Garst, 235 F.3d 1122, 1124 [150 Educ. L. Rep. 41] (8th Cir. 2001).

[60] McCullough v. Wyandanch Union Free Sch. Dist., 132 F. Supp.2d 87, 91[151 Educ. L. Rep. 874] (E.D.N.Y. 2001).

The Supreme Court of Arkansas struck down a state statute providing that any person who abuses or insults a teacher performing normal and regular assigned responsibilities is guilty of a misdemeanor.[65] In so doing, the court reversed a finding of delinquency against a thirteen-year-old student who referred to her teacher as a "bitch." Conceding that the statute failed to proscribe only fighting words, the court vitiated it as violating the First Amendment.

Association

A federal trial court in New York wrote that a former school employee had a triable claim for an alleged violation of her rights of association and free speech when she was discharged for cohosting a local radio program which broadcast comments critical of the board.[66] The court was also convinced that school officials engaged in an adverse employment action by rehiring the plaintiff's colleague, but not her, into a newly created position after both failed a civil service examination.

In New Jersey, an appellate court affirmed that a former teacher failed to present a section 1983 claim for retaliation, alleging that she was dismissed for political activity where her position was not one that required a political affiliation.[67] The court indicated that the teacher had not engaged in constitutionally protected conduct by aligning herself with and campaigning for a different slate of school board candidates.

Religion

An appellate court in Minnesota upheld the reassignment of a teacher who refused to teach evolution to his tenth-grade biology class.[68] The court declared that the teacher's free exercise claim failed because he had not brought an employment discrimination action to explain how he suffered from discrimination. The court also agreed that the teacher had no free speech right to teach a biology class in a manner that circumvented the course curriculum established by the school board.

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[61] 478 U.S. 675 (1986).

[62] 484 U.S. 260 (1988).

[63] 393 U.S. 503 (1969).

[64] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 [151 Educ. L. Rep. 86] (3d Cir. 2001).

[65] Shoemaker v. State of Ark., 38 S.W.3d 350 [152 Educ. L. Rep. 364] (Ark. 2001).

[66] Wheeler v. Natale, 137 F. Supp.2d 301 [153 Educ. L. Rep. 169] (S.D.N.Y. 2001).

[67] Bello v. Lyndhurst Bd. of Educ., 781 A.2d 70 [157 Educ. L. Rep. 755] (N.J. Super. Ct. App. Div. 2001).

[68] LeVake v. Indep. Sch. Dist. No. 656, 625 N.W.2d 502 [153 Educ. L. Rep. 356] (Minn. Ct. App. 2001).

Privacy

Two cases raised issues of privacy under state records laws. In interpreting the state's Access to Public Records Act, an appellate court in Indiana affirmed that a school board was not required to disclose information regarding job applicants.[69] The court posited that the Act authorizes disclosure for certain categories of information only with regard to present or former employees.

An appellate court in Ohio decreed that the state's Public Records Act does not prohibit the media from gaining access to the names, applications, and resumes of candidates for a position as superintendent of schools. The court rejected a board's claim that since the information was subject to Ohio's Trade Secrets Act, it was exempt from disclosure. Although the court agreed with the board that the information fit one of the definitions under the Trade Secrets Act, it could uncover neither an independent economic value for the information nor evidence how other private persons might benefit from knowing the names of the applicants. The court was guided by the rule "that any doubt must be resolved in favor of disclosure."[70]

Procedural Due Process

Procedural due process addresses how persons are treated when they have been charged with violations of statutes or rules. Critical among due process rights are those relating to notice and hearings. Liberty and property interests originate in the Fourteenth Amendment where employees cannot be deprived of employment entitlements or be stigmatized without appropriate due process. Property interests deal with expectations that employees allege they have, therefore entitling them to due process before those expectations can be adversely affected.

The Seventh Circuit affirmed that a Wisconsin principal's loss of certain duties, such as direct supervision of employees and student discipline, did not amount to a deprivation of a property interest so as to be subject to procedural due process protection.[71] The court pointed out that the principal retained her title and same wage and could have reasonably expected that she would be able to perform other duties. The court added that the loss of some of her job functions did not render working conditions so intolerable that the principal's resignation constituted constructive discharge.

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[69] South Bend Tribune v. S. Bend Cmty. Sch. Corp., 740 N.E.2d 937 [150 Educ. L. Rep. 253] (Ind. Ct. App. 2000).

[70] State *ex rel.* Dayton Newspapers v. Dayton Bd. of Educ., 747 N.E.2d 255, 260 [153 Educ. L. Rep. 756] (Ohio Ct. App. 2000).

[71] Ulichny v. Merton Cmty. Sch. Dist., 249 F.3d 686 [153 Educ. L. Rep. 573] (7th Cir. 2001).

In Pennsylvania, an appellate court rejected the claim of a high school coach with ten years of experience who alleged that he had a protected property interest in his job.[72] The coach's contract was not renewed after the athletic director reported to the building principal and assistant principal that the coach allegedly used a racial epithet during a game. The coach filed suit, alleging violations of his federal constitutional and liberty interests, along with a state defamation claim. The court rejected the constitutional claims because the annual coaching contract did not create an entitlement to renewal and the plaintiff, who retained his teaching job, was not stigmatized. Even so, the court agreed that since the coach presented a question of fact as to defamation, that issue was entitled to go to trial.

On the other hand, the Tenth Circuit permitted a high school football coach in Utah to go to trial on the issue of whether he had a property interest in his coaching position. Although conceding that the coach's property interest could not be based on his continuing contract as a teacher or on his collective bargaining agreement, the court observed that a material question of fact existed as to whether coaches served at the discretion of the principal or whether there was an unwritten policy that they can be dismissed only for cause. Citing to *Perry v. Sindermann*,[73] the court stated that "it is well established that an implied-in-fact contract is a source of state law that can potentially create an expectation of continued public employment."[74]

Regarding liberty interests, the Eighth Circuit, in a case of first impression from Nebraska, affirmed that a school board and its superintendent were not liable for the sexual molestation of a student by one of the district's former teachers. The court agreed that a confidential settlement agreement with the teacher, rather than dismissing him outright for molesting a student, along with a neutral letter of recommendation, did not rise to the level of deliberate indifference. In rejecting the plaintiff's Fourteenth Amendment liberty claim, the court determined that "public schools do not have a duty to protect school children from private violence."[75] Turning to the plaintiff's title IX claim, the court agreed that the defendants lacked control over the teacher's sexual molestation of a child at another school. The court ascertained that allegations of sexual abuse in the district were disputed and that officials had not acted with deliberate indifference in helping the teacher to obtain another position by means of a letter of recommendation. Ironically, the board entered into the confidential settlement in order to avoid $3,000-4,000 in legal fees to conduct a termination hearing—expenses that were probably exceeded in this litigation.

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[72] Puchalski v. Sch. Dist. of Springfield, 161 F. Supp. 2d 395 [156 Educ. L. Rep. 1092] (E.D. Pa. 2001).

[73] 408 U.S. 593, 601-02 (1972).

[74] Kingsford v. Salt Lake City Sch. Dist., 247 F.3d 1123 [153 Educ. L. Rep. 68] (10th Cir. 2001).

[75] Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773, 781 [153 Educ. L. Rep. 600] (8th Cir. 2001).

As reflected by a case from New York, property and liberty interest claims can occur in the same case. A federal trial court granted a school board's motion to dismiss a case filed by a probationary teacher whose contract was terminated because she helped students cheat on standardized tests.[76] The court was satisfied that since the teacher did not have a property interest in her job, she was not entitled to due process. Even though the former teacher had a liberty interest regarding allegedly defamatory statements made in connection with her dismissal, the court was content that she received sufficient due process at her disciplinary hearing.

The Seventh Circuit, in a case from Illinois, affirmed that a tenured physical educator was not denied liberty and property interests when he was temporarily transferred following the death of one of his students.[77] The court maintained that the transfer did not violate his property interest where the teacher was fully paid during the investigation. The court believed that statements that school officials made to the media after the teacher's dismissal did not violate his liberty interest since he failed to make a showing that he lost prospective employment opportunities.

Aspects of Notice

Notice issues can arise for violations under the Constitution or state statutes. As to a constitutional concern, an appellate court in New Mexico affirmed that a school board failed to provide a custodian with the pre- and post-termination due process to which he was entitled. In applying the Supreme Court's balancing test from *Mathews v. Eldridge*,[78] the court agreed that the custodian had not received sufficient information about the board meeting at which his dismissal was considered.[79] The court posited that the notice the board provided to the custodian not only decreased the likelihood that he would appear at the pretermination meeting but also that he would not request a post-termination hearing.

Four cases involved compliance with state statutes. An appellate court in Arkansas reversed an earlier finding that a former teacher's dismissal complied with the state's Teacher Fair Dismissal Act.[80] The court ruled that the school board, while voting to accept the superintendent's recommendation for dismissal, failed to obtain a majority vote with regard to the truth of the reasons he gave to the teacher in support of the recommended dismissal. The court noted that, while the teacher received notice only that the board was voting to dismiss him over charges of theft by receiving and possessing drugs with intent to deliver and possession of handguns, it also considered other charges of which he had not been provided notice. The court decided that since the teacher did not receive notice for two of the three reasons listed in the board's letter, he had not received the notice required by state law. Similarly, the Supreme Court of Nevada affirmed that a school board's failure to follow statutory notice requirements when dismissing a teacher effectively rendered its action void.[81] In upholding a grant of summary judgment in favor of the teacher, the court reasoned that state law required fifteen days' notice prior to dismissal, along with notice of a right to a hearing. The court remarked that since the teacher received only four days' notice and no notice of a hearing, his dismissal was invalid.

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[76] Rivera v. Cmty. Sch. Dist. Nine, 145 F. Supp.2d 302 [155 Educ. L. Rep. 235] (S.D.N.Y. 2001).

[77] Townsend v. Vallas, 256 F.3d 661 [155 Educ. L. Rep. 142] (7th Cir. 2001).

[78] 424 U.S. 319 (1976).

[79] Franco v. Carlsbad Mun. Schs., 28 P.3d 531 [155 Educ. L. Rep. 1461] (N.M. Ct. App. 2001).

[80] Jackson v. El Dorado Sch. Dist., 48 S.W.3d 558 [155 Educ. L. Rep. 936] (Ark. Ct. App. 2001).

A school business manager challenged his school board's failure to provide timely notice over the nonrenewal of his contract. On further review, the Supreme Court of Ohio held that, based on the board's failure to comply with state law, the school business manager was entitled to a new two-year contract.[82]

The federal trial court in Vermont denied a school board's motion for summary judgment in a dispute over the termination of a teacher's contract.[83] The court explained that the board's giving the teacher oral notice in June that officials did not yet know whether his contract was going to be renewed was insufficient to comply with a state statute requiring written notice by April 15.

Aspects of Hearing

Requesting a hearing may be part of an employee's responsibility to exhaust administrative remedies. The Supreme Court of North Dakota affirmed that the wrongful dismissal claim of a teacher (his contract was terminated for not following school board procedures related to driving a district-owned bus) was properly dismissed since he failed to exhaust administrative remedies.[84] The court offered that since the teacher never requested a board meeting to challenge existing factual questions that should have been addressed in a board hearing, he failed to exhaust administrative remedies.

As reflected by a case before the Supreme Court of Pennsylvania, bias can be an issue in hearings. The court upheld the demotion of a high school principal to a job as a teacher, despite his claim that a board member's refusal to recuse himself when his wife provided testimony adverse to the plaintiff's interest demonstrated bias.[85] The court judged that, even if the plaintiff had raised a bias claim, the state secretary of education's de novo review cured any procedural impropriety. Conversely, the Supreme Court of Oklahoma concluded that a tenured teacher was entitled to a hearing on her motion that the trial judge recuse himself because of the negative comments that he made.[86] Insofar as the trial judge failed to act on the teacher's motion, and the court was convinced that her constitutional right to a hearing was at issue, it discerned that she was entitled to a hearing on the issue of recusal.

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[81] Clark County Sch. Dist. v. Riley, 14 P.3d 22 [149 Educ. L. Rep. 615] (Nev. 2000).

[82] State *ex rel.* Chapnick v. E. Cleveland City Sch. Dist. Bd. of Educ., 755 N.E.2d 883 [157 Educ. L. Rep. 302] (Ohio 2001).

[83] Latouche v. N. Country Union Free High Sch. Dist., 131 F. Supp.2d 568 [151 Educ. L. Rep. 817] (D. Vt. 2001).

[84] Schuck v. Montefiore Pub. Sch. Dist. No. 1, 626 N.W.2d 698 [154 Educ. L. Rep. 305] (N.D. 2001).

[85] Katruska v. Bethlehem Ctr. Sch. Dist., 767 A.2d 1051 [151 Educ. L. Rep. 943] (Pa. 2001).

Hearings are easily related to property interests. In a case of first impression, the Supreme Court of Idaho upheld a grant of summary judgment in favor of a teacher who claimed that her school board's nonrenewal of her extra duty coaching assignments violated due process.[87] The court agreed that since the reduction of the teacher's compensation under a master union contract covered both classroom and extra duty assignments, she had a property interest in extra duty assignments. In addition to asserting that the nonrenewal of these assignments without notice and a hearing violated the teacher's procedural due process rights, the court affirmed awards of reinstatement and back pay.

A case from Kentucky illustrates how pretermination hearings serve an important function in permitting an individual to challenge the reason for dismissal before it occurs. The court was of the opinion that the pretermination hearing conducted for a teacher who was discharged after one year of service for initiating class discussions with students about circumcision and penis size met the due process standard of *Cleveland Board of Education v. Loudermill*.[88] The court observed that the teacher was allowed to be heard before being dismissed by the superintendent and exercised his statutory right of appeal within ten days, while school officials investigated the claims of students. The court upheld the cursory nature of the pretermination hearing because "the school district had a vital and legitimate interest in protecting its students from teachers who may be exposing students to sexually explicit conversations."[89] In any event, the court contended that the cursory predismissal hearing was saved under due process analysis based on the board's extensive post-termination hearing.

Dismissal, Nonrenewal, Demotion, and Discipline

Along with the substantive grounds for dismissal or discipline, cases have raised a number of interesting procedural questions. The Fifth Circuit affirmed a grant of summary judgment in favor of a school board in Louisiana where a black elementary teacher claimed that his dismissal was racially motivated.[90] In acknowledging that the board nonrenewed the teacher's contract after he violated several of its policies, including the use of corporal punishment and showing a "R" rated film, the court agreed that his discrimination claim failed because he did not prove that the board's grounds were pretextual.

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[86] Clark v. Bd. of Educ. of Indep. Sch. Dist. No. 89, 32 P.3d 851 [157 Educ. L. Rep. 911] (Okla. 2001).

[87] Farner v. Idaho Falls Sch. Dist. No 91, 17 P.3d 281 [150 Educ. L. Rep. 957] (Idaho 2000).

[88] 470 U.S. 532 (1985).

[89] Lafferty v. Bd. of Educ. of Floyd County, 133 F. Supp.2d 941, 946 [152 Educ. L. Rep. 562] (E.D. Ky. 2001).

In the first of three cases from New York, an appellate court upheld the dismissal of a probationary teacher whose union claimed she was released in retaliation for union activity.[91] Since the teacher's status was probationary, the court agreed that the school board met its obligation of providing a rational basis for its action by demonstrating that she failed to follow proper school procedures and instructions while also failing to protect a student.

An appellate court in New York affirmed the dismissal of a probationary teacher who claimed that her discharge was invalid because she was tenured.[92] In pointing out that the teacher failed to appeal the trial court's judgment within the statutory four-month period, the tribunal agreed that the statute of limitations began to run when she received the school board's termination letter, not when the exhaustion of administrative review pursuant to the union contract was complete. Similarly, another appellate court in New York rejected a principal's challenge to his dismissal.[93] According to the court, the principal's dismissal became effective on the date stated in the letter from the chancellor of education and that his petition, filed more than one year from that date, was untimely.

In Illinois, a federal trial court held that a first-grade teacher who was dismissed for inappropriate conduct with female students, and later reinstated with a remediation plan, was entitled to go to trial on claims of defamation and civil conspiracy against board members and fellow teachers.[94] The court noted that, at trial, the issues would be the teachers' good faith in making allegations regarding the plaintiff's conduct with students and an agreement between board members and teachers to deprive her of employment.

An appellate court in North Carolina affirmed that a teacher who was subjected to more than fifteen classroom observations and conference meetings, had her teaching videotaped, and was transferred to a school a long distance from the one her children attended did not present facts that were sufficiently outrageous to support a claim for intentional infliction of emotional distress.[95] The court wrote that all of the measures were part of an improvement plan and that, in the absence of bad faith, school officials' placing the teacher on probation and putting a letter in her file charging her with insubordination for refusing to sign it did not rise to the level of personal animosity.

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[90] Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400 [153 Educ. L. Rep. 557] (5th Cir. 2001).

[91] Rockville Ctr. Teachers Ass'n v. N.Y. State Pub. Employment Relations Bd., 721 N.Y.S.2d 112 [151 Educ. L. Rep. 540] (N.Y. App. Div. 2001).

[92] Lipton v. N.Y. City Bd. of Educ., 726 N.Y.S.2d 95 [154 Educ. L. Rep. 638] (N.Y. App. Div. 2001).

[93] Budihas v. Bd. of Educ., N.Y., 728 N.Y.S.2d 493 [155 Educ. L. Rep. 1320] (N.Y. App. Div. 2001).

[94] Bogosian v. Bd. of Educ. of Cmty. Unit Sch. Dist., 134 F. Supp.2d 952 [152 Educ. L. Rep. 634] (N.D. Ill. 2001).

[95] Stamper v. Charlotte-Mecklenburg Bd. of Educ., 544 S.E.2d 818 [152 Educ. L. Rep. 832] (N.C. Ct. App. 2001).

In an interesting case involving material from a personnel file, the federal trial court in Massachusetts decreed that an employee, who alleged that another staff member sent material from his personnel file to the local newspaper in retaliation for his filing an earlier suit, could obtain handwriting samples of those employees during a deposition.[96] The court declared that this was an appropriate matter for discovery.

A federal trial court in Oklahoma permitted a teacher, charged with the criminal offense of sexual molestation of a student, to intervene in a civil action that she filed against the school board.[97] Insofar as the state's Teacher Due Process Act did not provide protection for the teacher under these circumstances, the court reflected that intervention in the civil case would not have circumvented the limitations on discovery in the criminal action.

In Texas, an appellate court reinstated the suit of a custodian who claimed that he was subject to wrongful dismissal.[98] The panel was of the opinion that the trial court improperly dismissed the custodian's claim for lack of subject matter jurisdiction.

Insubordination

In the first of two cases from New York upholding dismissals for insubordination, an appellate court affirmed the discharge of teachers' aides who reported suspected child abuse to their union representative rather than to management officials.[99] The court agreed that the aides were dismissed for failing to follow a supervisor's directive about reporting and for endangering the safety of a child rather than for engaging in protected union activity. A second court upheld the dismissal of an eleventh-grade honors teacher who used sexually explicit terms to describe a literary criticism theory of phallogocentrism.[100] Both the trial and appellate courts agreed that the teacher ignored warnings not to emphasize the sexual aspects of literary works and to be cautious about classroom discussions with sexual overtones.

A North Carolina appellate court ordered the reinstatement of a special education teacher who was dismissed for insubordination.[101] The court ruled that the school board was bound by a case manager's determination that certain evidence was inadmissible and that substantial evidence supported a finding of no insubordination.

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[96] Harris v. Athol-Royalton Reg'l Sch. Dist. Comm., 200 F.R.D. 18 [153 Educ. L. Rep. 292] (D. Mass. 2001).

[97] Nunley v. Pioneer Pleasant Vale Sch. Dist., 149 F. Supp.2d 1283 [155 Educ. L. Rep. 486] (W.D. Okla. 2001).

[98] Sullivan v. Wilmer Hutchins Indep. Sch. Dist., 47 S.W.3d 529 [155 Educ. L. Rep. 924] (Mich. Ct. App. 2000).

[99] Hoey v. N.Y. State Pub. Employment Relations Bd., 725 N.Y.S.2d 449 [154 Educ. L. Rep. 265] (N.Y. App. Div. 2001).

[100] Bernstein v. Norwich City Sch. Dist. Bd of Educ., 726 N.Y.S.2d 474 [154 Educ. L. Rep. 916] (N.Y. App. Div. 2001).

[101] Farris v. Burke County Bd. of Educ., 544 S.E.2d 578 [152 Educ. L. Rep. 824] (N.C. Ct. App. 2001).

Unprofessional Conduct, Unfitness, and Willful Neglect of Duty

Courts were split on whether employees could be dismissed for one or more of these grounds. The Supreme Court of Louisiana ordered the reinstatement of a high school teacher whose contract was terminated for willful neglect of duty after he brought a gun onto school property.[102] Even though the gun was in the teacher's car parked in an area easily accessible to students, the court was satisfied that there was no evidence that he failed to follow orders or an identifiable school policy.

The Supreme Court of Texas affirmed the reinstatement of a term-contract teacher.[103] When the school board elected to have a hearing examiner conduct a hearing under state law, rather than do so itself, the court decided that it was bound by the examiner's findings of fact. Thus, based on the hearing examiner's comment that the derogatory term a teacher used when referring to a student did not support the board's claim that she failed to maintain effective working relationships, the court agreed that she was entitled to reinstatement.

In a second case from Texas, an appellate court affirmed that a tenured teacher's failure to go to work for three months while a transfer protest was pending was sufficient good cause to terminate her contract.[104] The court agreed that evidence supported the school board's position that no one told the teacher that a transfer protest relieved her of the duty to report to work.

An appellate court in Washington reversed the termination of a bus driver's contract for off-site misconduct based on her having supplied alcohol to minors during her teenage son's party at her house.[105] The court believed that jury instructions inadequately required a nexus between discharge and the driver's job performance.

In Louisiana, a former assistant principal unsuccessfully challenged his discharge for willful neglect of duty for using excessive force toward students.[106] The court posited that the assistant principal received prior reprimands for improper physical contact with students as well as counseling and warnings for use of excessive force.

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[102] Howard v. W. Baton Rouge Parish Sch. Bd., 793 So. 2d 153 [157 Educ. L. Rep. 422] (La. 2001).

[103] Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559 [150 Educ. L. Rep. 530] (Tex. 2000).

[104] Miller v. Houston Indep. Sch. Dist., 51 S.W.3d 676 [156 Educ. L. Rep. 708] (Tex. App. 2001).

[105] Ruchert v. Freeman Sch. Dist., 22 P.3d 841 [153 Educ. L. Rep. 424] (Wash. Ct. App. 2001).

[106] Chapital v. Orleans Parish Sch. Bd., 780 So. 2d 1110 [152 Educ. L. Rep. 852] (La. Ct. App. 2001).

Immorality

Employees prevailed in all three of the cases where immorality was the basis for discipline. An appellate court in Ohio maintained that an associate superintendent's adulterous affair with another school district employee was not immoral behavior within the meaning of the statutory ground for dismissal. In ordering the assistant superintendent's reinstatement, the court ascertained that statutory immorality cannot be based on rumors of an affair and the negative perception that he was not an appropriate role model. The court added that discharging employees for immorality based on the type of role model parents might like for their children "would open the door to allow other teachers to be terminated because of race, religion, political beliefs, and/or sexual orientation."[107]

An appellate court in Louisiana reversed the suspension of a tenured teacher for immorality as a result of his successfully challenging the school board's random drug testing.[108] The court reasoned that the board presented insufficient evidence to establish a chain of custody and that officials had not created evidentiary rules regarding the standard to be used for such a chain of custody.

In Indiana, an appellate court upheld the reinstatement of a long-term substitute who was removed from his teaching position for showing his nipple ring to an eighth-grade student on the ground that he did not engage in immorality and sexual harassment.[109] Even in conceding that the teacher's conduct demonstrated poor judgment, the court agreed with an arbitrator that his conduct did not rise to the level of immorality. The court ordered the board to reinstate the plaintiff's name on the list of substitutes along with granting him back pay from the date of his dismissal to the end of the school year, minus one week's disciplinary suspension.

Incompetence

An appellate court in Georgia upheld a school board's dismissal of its media and technology coordinator for videotaping a girls' locker room.[110] The court observed that the school's principal, who was also the plaintiff's wife, directed that a video camera be set up in the locker room and, in response to an earlier theft, be aimed at the door to apprehend a possible thief. In aiming the camera at an area including the one where female players and cheerleaders changed clothes, storing the tapes, and failing to erase the contents within two years, the court was convinced that the plaintiff presented the board with good and sufficient cause for his dismissal.

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[107] Bertolini v. Whitehall City Sch. Dist. Bd. of Educ., 744 N.E.2d 1245, 1252 [152 Educ. L. Rep. 259] (Ohio Ct. App. 2000).

[108] Arriola v. Orleans Parish Sch. Bd., 789 So.2d 64 [155 Educ. L. Rep. 1509] (La. Ct. App. 2001).

[109] Fort Wayne Educ. Ass'n v. Fort Wayne Cmty. Schs., 753 N.E.2d 672 [156 Educ. L. Rep. 305] (Ind. Ct. App. 2001).

[110] Clinch County Bd. of Educ. v. Hinson, 543 S.E.2d 91 [152 Educ. L. Rep. 322] (Ga. Ct. App. 2000).

Compliance with School Board Policies and State Statutes

State law can establish requirements for notice and reasons for a school board's action. The Supreme Court of Iowa ruled that a board's conclusory statement that there was insufficient evidence to constitute probable cause for disciplinary action was inadequate.[111] In reversing an earlier judgment in favor of the board, the court interpreted state law as requiring it to furnish a statement of reasons sufficient to justify its interpretation of the probable cause requirement.

In California, an appellate court asserted that a temporary teacher whose contract was not renewed at the end of her first year due to a district's financial problems was not entitled to rely on statutory notice provisions for probationary employees.[112] The court explained that, based on state law, a temporary employee who does not receive notice of that status at the time of employment is considered a probationary employee. The court also offered that the teacher, who was interviewed on August 20, and started working on August 26, was not notified of her temporary status until after the September 9 board meeting that approved her employment. In rejecting the teacher's claim for probationary status, the court remarked that the date of employment that mattered was the one when the board met, not the first day of teaching.

As reflected by a case before the Supreme Court of Montana, state law affects procedural rights for employees. The court held that an assistant superintendent dismissed without the benefit of hearing or a determination of good cause was entitled to damages.[113] The court contended that since the state tenure act excluded only superintendents, the plaintiff was covered by its protections.

In Ohio, a trial court ordered a school board to reinstate a school bus driver because its resolution failed to state a ground for dismissal.[114] The court was of the view that, even though the board and bus driver signed a settlement agreement less than one year earlier that gave her one last chance to retain her position, the board was still subject to state law when it terminated her employment. The court pointed out that the board failed to comply with a provision in state law which required it to rely on a specific finding that the bus driver committed one or more acts justifying dismissal.

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[111] Lewis Cent. Educ. Ass'n v. Iowa Bd. of Educ. Exam'rs, 625 N.W.2d 687 [153 Educ. L. Rep. 372] (Iowa 2001).

[112] Kavanaugh v. W. Sonoma County Union High, 111 Cal. Rptr.2d 829 [156 Educ. L. Rep. 1174] (Cal. Ct. App. 2001).

[113] Small v. Bd. of Trs., Glacier County Sch. Dist. No. 9, 31 P.3d 358 [156 Educ. L. Rep. 1434] (Mont. 2001).

[114] Ulferts v. Black River Local Sch. Dist. Bd. of Educ., 742 N.E.2d 1224 [151 Educ. L. Rep. 248] (Ohio Com. Pleas 2000).

An appellate court in New York ordered the reinstatement of a provisional science teacher when it discerned that his unsatisfactory performance rating was arrived at inappropriately.[115] The court declared the rating was neither preceded by an inspection of the teacher's work nor by a consultation with an appropriate official.

As illustrated by a case from Florida, federal laws can establish requirements for employees. An appellate court reversed the dismissal of an area transportation manager who tested positive for drugs.[116] Although issues of fact existed as to whether the plaintiff's drug test was reliable, the board ordered his termination based on an incorrect belief that he was required to hold a CDL (commercial driver's license). The court was of the opinion that the manager had not violated federal regulations prohibiting any person with a CDL from operating commercial vehicles while under the influence of controlled substances. The court concluded not only that a CDL was not a requirement for the manager's job but also that the employee performed managerial and supervisory functions as opposed to driving a school bus.

State whistleblower-type laws provide the basis for litigation. An appellate court in California indicated that a teacher was entitled to $672,000 and double back pay under the state's False Claims Act.[117] The Act prohibits employers from adversely affecting an employee's employment as a result of his or her furnishing information to a government entity or for furthering a false claims action. The court determined that the plaintiff was covered by the statute because he threatened to reveal to the state department of education that his employer was claiming ADA funds from the state without providing the expected level of classroom staffing.

In Texas, a federal trial court dismissed an administrator's claim that she was reassigned in retaliation for making good faith reports protected by the state's Whistleblower Act.[118] The court decreed that the administrator failed to produce credible evidence based on first- or secondhand knowledge that teachers engaged in unacceptable conduct in administering the Texas Assessment of Academic Skills.

A case before the Supreme Court of Alabama reflected how state law can affect appointment of employees. The court upheld a school board's replacing a custodian with a person who was not recommended by the superintendent.[119] The court agreed that a long-standing board policy requiring the superintendent's recommendation for a custodian of school funds was inconsistent with a state law which gave boards the authority to appoint custodians, and that the law forbade boards from promulgating policies that were inconsistent with state law.

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[115] Bonilla v. Bd. of Educ. of N.Y., 728 N.Y.S.2d 69 [155 Educ. L. Rep. 1305] (N.Y. App. Div. 2001).

[116] McIntyre v. Seminole County Sch. Bd., 779 So. 2d 639 [152 Educ. L. Rep. 440] (Fla. Dist. Ct. App. 2001).

[117] LeVine v. Weis, 108 Cal.Rptr.2d 562 [156 Educ. L. Rep. 653] (Cal. Ct. App. 2001).

[118] Rodriguez v. Bd. of Trs. of the Laredo Indep. Sch. Dist., 143 F. Supp.2d 727 [155 Educ. L. Rep. 177] (S.D. Tex. 2001).

[119] Stephenson v. Lawrence County Bd. of Educ., 782 So. 2d 192 [153 Educ. L. Rep. 452] (Ala. 2000).

Agreements between unions and school boards must comply with state law. An appellate court in Indiana affirmed that a statutory amendment allowing a school board and a union to change statutory provisions over the nonrenewal of nonpermanent contracts did not grant an arbitrator the right to renew the contract of a nonpermanent employee.[120] The court acknowledged that the amendment only authorized the board and union to include language in an agreement giving an arbitrator the authority to reinstate a nonpermanent teacher. Lacking this authorization, the court agreed that an arbitrator's authority was limited by state statute.

Reduction-in-force and Involuntary Leaves of Absence

Necessity for Reduction-in-force

An appellate court in Alabama reversed a school board's cancellation of an employee's contract as director of vocational/technical education in midyear, ostensibly because the position was no longer needed for the efficient operation of the facility.[121] According to the court, the director's due process rights were violated since the board failed to notify her that another reason for canceling her contract was to prevent her from acquiring tenure. The court also wrote that board members demonstrated bias against the director that should have required their recusal.

Elimination of Position

An appellate court in Minnesota agreed that state law entitled the board of a small school district to abolish the jobs of its full-time elementary and part-time secondary principals while placing the plaintiff, the elementary school principal, on an unrequested leave of absence.[122] The board then reassigned the plaintiff's duties to its part-time superintendent and offered the plaintiff a full-time teaching position. The court noted that the board's action was permissible since it was based on a $676,000 shortfall, its not having a general reserve, and declining student enrollment. The court observed that the plaintiff could not be returned to a position that had been abolished even if the elimination of a job does not legally require that all of its duties cease to exist.

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[120] North Miami Educ. Ass'n v. N. Miami Cmty. Schs., 746 N.E.2d 380 [153 Educ. L. Rep. 352] (Ind. Ct. App. 2001).

[121] State Tenure Comm'n v. Page, 777 So. 2d 699 126 [151 Educ. L. Rep. 699] (Ala. Civ. App. 2000).

[122] State *ex rel.* Quiring v. Bd. of Educ. of Indep. Sch. Dist. No. 173, 623 N.W.2d 634 [152 Educ. L. Rep. 271] (Minn. Ct. App. 2001).

Selection of Employees

The Supreme Court of South Dakota upheld a finding of the state's department of labor that a school board failed to follow the RIF policy in its *collective bargaining* contract.[123] In not releasing an employee who had three consecutive years of employment, but discharging one with more than three years of service, albeit not continuous, the court judged that the board failed to RIF by length of service.

The Supreme Court of Appeals of West Virginia upheld an administrative law judge's adjudication that a school board had to retain two secretaries as opposed to multiclassified school service employees who had seniority in many categories, but not secretarial.[124] The court observed that the two secretaries must be retained since they had seniority in their category, even though the multiclassified personnel retained their seniority in the other categories.

In a second case from West Virginia, a federal trial court permitted the reapportionment among three probationary physical education teachers as part of a RIF.[125] The plaintiff, who was white and received a .80 full-time equivalent assignment, alleged that the black principal improperly allocated .75 to a black teacher with less seniority. In rejecting the teacher's claim of racial discrimination, the court believed that the board's order of reduction directed that teachers within a department be reduced in order of seniority, but did not require that the least senior members absorb the entirety of any wholesale RIF.

Realignment/Reassignment

Courts took different approaches in addressing this topic. In an interesting realignment case, an appellate court in Minnesota upheld a teacher's statutory right to realignment while also commenting that the educational interests of the school would not have been served by her proposed realignment.[126] The court affirmed that the plaintiff, a continuing contract art teacher, was not entitled to bump into the supervisory assignments of two lesser-tenured teachers involving lunchroom and study halls. The court maintained that existing schedules did not permit the teacher to both teach her reduced number of art classes and handle the supervisory duties. The court held that the board was not required to rearrange the school's schedule to accommodate more senior teachers where the time into which she would have been bumping involved supervisory rather than licensed functions.

In Massachusetts, an appellate court resolved a conflict in bumping rights between a union contract and state law where the former limited bumping to teachers within the same bargaining unit while the latter extended rights to other units. The court ruled that state law preempted the contract.[127]

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[123] Gettysburg Sch. Dist. v. Larson, 631 N.W.2d 196 [155 Educ. L. Rep 1375] (S.D. 2001).

[124] Taylor-Hurley v. Mingo County Bd. of Educ., 551 S.E.2d 702 [156 Educ. L. Rep. 1441] (W. Va. 2001).

[125] Dugan v. Albemarle County Bd. of Educ., 148 F. Supp.2d 688 [155 Educ. L. Rep. 360] (D. W. Va. 2001).

[126] Moe v. Indep. Sch. Dist. No. 696, 623 N.W.2d 899 [152 Educ. L. Rep. 288] (Minn. Ct. App. 2001).

An appellate court in New York affirmed that a tenured school psychologist was not entitled to a newly created position as an elementary counselor when her job was abolished.[128] The court reasoned that the new job included additional duties that required skills not necessary for the performance of the more limited duties of a counselor. The court concluded that since the two positions were not the same, the plaintiff did not have a right under state law to be assigned to the position.

Call-back Rights

In the first of two cases where employees were not entitled to call-back rights, an appellate court in California ascertained that a school board that laid off a first-year probationary teacher for economic reasons could not grant her preferential rehiring rights.[129] The court pointed out that, under state law, a teacher must have a minimum of two years' service in order to be eligible for preference rights.

An appellate court in New York affirmed that a teacher who was released when her position was eliminated for budgetary reasons was not entitled to recall when a new position was created.[130] The court agreed that the plaintiff's former job, as chairperson for social studies at a middle school, was not similar to the new position as district-wide chair of social studies.

In an interesting federal case from Connecticut, the court permitted a teacher who was dismissed due to budget cuts to sue the superintendent and school board for their failure to accept another teacher's resignation in a timely manner so that she could claim her call-back rights.[131] Even though the other teacher had completed all of the paperwork necessary to retire before the plaintiff's three-year call-back rights expired, the board delayed acceptance until after the three-year recall period had expired. The court denied the board's motion for summary judgment and the board members' claims for qualified immunity.

Contract Disputes

Cases in this section involve contracts negotiated by school boards and statutory provisions that affect these agreements. The Supreme Court of Appeals of West Virginia was of the opinion that an applicant for a position at a community learning center was entitled to file a grievance even though a management team controlled the program in which the position was located.[132]

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[127] Ballotte v. City of Worcester, 748 N.E.2d 987 [154 Educ. L. Rep. 297] (Mass. Ct. App. 2001).

[128] Davis v. Mills, 726 N.Y.S.2d 808 [155 Educ. L. Rep. 756] (N.Y. App. Div. 2001).

[129] California Teachers Ass'n v. Mendocino Unified Sch. Dist., 111 Cal.Rptr.2d 879 [156 Educ. L. Rep. 1183] (Cal. Ct. App. 2001).

[130] Donato v. Bd. of Educ., 729 N.Y.S.2d 187 [156 Educ. L. Rep. 291] (N.Y. App. Div. 2001).

[131] Harhay v. Blanchette, 160 F. Supp.2d 306 [156 Educ. L. Rep. 1016] (D. Conn. 2001).

[132] Napier v. Lincoln County Bd. of Educ., 551 S.E.2d 362 [156 Educ. L. Rep. 700] (W. Va. 2001).

The court asserted that the grievance could proceed not only because the team was not independent from the school board, but also since state law forbids boards from creating separate organizations that are immune from the grievance process.

Board Policies and Contract Stipulations

In a case of first impression from Tennessee, an appellate court affirmed the rejection of a union's claim that the selection of a high school principal was subject to collective bargaining.[133] The court agreed that, under state law, only the school board had the authority to fill principalship vacancies.

As reflected by a case from Arkansas, state law can affect employee salaries and benefits. An appellate court indicated that a teacher was entitled to a trial to determine whether she had been paid the appropriate daily rate for days worked beyond the 185-day school year.[134] The court was convinced that the case had to be remanded for trial even though the teacher's contract, which provided for a lesser sum, was illegal since it was unclear whether she actually worked beyond the last day of school.

An appellate court in Colorado remarked that an early retirement policy created a promise to provide benefits.[135] The court explained that since the policy had not been phased out by the time a custodian applied for benefits, he was entitled to go to trial on the issue of whether budgetary considerations precluded the board from granting him benefits.

School boards can be liable for failing to meet state statutory requirements relating to salary. An appellate court in Washington reversed a grant of summary judgment in favor of a school board that failed to report a teacher's bachelor degree for purposes of calculating salary.[136] The court agreed with the teacher that a question of mutual mistake was present as to how his college credits were to be used on the salary schedule.

A case from South Carolina involved the interpretation of that state's Education Finance Act and the Education Improvement Act (EIA). An appellate court declared that twelve-month teachers were entitled both to compensation under the statewide minimum salary statute and to the supplement paid by a local board that was above the statutory minimum under EIA.[137]

State law can affect minimum wage. An appellate court in New York noted that since students involved in a school construction project pursuant to a workforce training program were not employees, they did not have to be paid the prevailing union wage under state law.[138] The court was of the view that the students were not subject to the statute because they were assigned tasks to fulfill a technology class requirement, were not hired or paid, did not work a regular work day, and performed no work without the direct and constant supervision of their instructors.

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[133] Carter County Bd. of Educ. v. Carter County Educ. Ass'n, 56 S.W.3d 1 [158 Educ. L. Rep. 465] (Tenn. Ct. App. 2001).

[134] Bond v. Lavaca Sch. Dist., 38 S.W.3d 923 [152 Educ. L. Rep. 371] (Ark. Ct. App. 2001).

[135] Shaw v. Sargent Sch. Dist., 21 P.3d 446 [152 Educ. L. Rep. 780] (Colo. Ct. App. 2001).

[136] Rigos v. Cheney Sch. Dist. No. 360, 26 P.3d 304 [155 Educ. L. Rep. 880] (Wash. Ct. App. 2001).

[137] Abraham v. Palmetto Unified Sch. Dist. No.1, 538 S.E.2d 656 [149 Educ. L. Rep. 909] (S.C. Ct. App. 2000).

School boards were sued under various theories related to breach of contract. The Supreme Court of Tennessee decided that teachers' aides who alleged that their one-year contracts were arbitrarily terminated were not entitled to back pay and benefits.[139] In reversing an award in favor of the aides, the court asserted that the aides did not have a reasonable expectation of continued employment so as to give them an entitlement to pay and benefits beyond the expiration of their contracts.

An appellate court in Texas reversed the denial of a superintendent's motion for summary judgment after he was sued by a former teacher who resigned, pursuant to an agreement with the school board.[140] According to the court, the superintendent's statements to the media regarding the circumstances under which the teacher resigned were covered by the state's professional immunity statute. In rejecting the teacher's breach of contract claim, the court observed that determining whether to talk with the media and selecting a response are discretionary acts which rendered the superintendent immune from a lawsuit.

In an interesting breach of contract case, an appellate court in Pennsylvania decreed that a teacher was entitled to a trial on the issue of whether her resignation within the school year following her sabbatical year entitled the school board to recover benefits paid to her during the sabbatical.[141] In remanding for trial, the court contended that material facts existed as to whether the teacher returned to the "same position" as required under a state statute.

An appellate court in California wrote that two employment contracts drafted by a school board, which permitted the dismissal of probationary teachers on fifteen days' notice, violated state law.[142] The court was satisfied that state law required a minimum of thirty days' notice. The court also noted that since the teachers were hired as interns under the state's Teacher Education Internship Act, they were entitled to probationary status because, under state law, the category of interns is accorded probationary status.

In New York, an appellate court affirmed that a superintendent's written employment agreement was not a defense to a school board's claim for breach of contract.[143] The plaintiff, who announced his intention not to extend his employment beyond the end of his contract which expired on June 30, 1997, took vacation on April 30, 1997, and began serving as a superintendent in Rhode Island. The board refused to compensate the superintendent past April 15, and sued him for breach of contract. Insofar as the contract required the superintendent to devote his full-time attention to the district, the court agreed that the agreement did not envision outside employment, even if he was on vacation.

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[138] Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. v. McGowan, 728 N.Y.S. 2d 109 [155 Educ. L. Rep. 1310] (N.Y. App. Div. 2001).

[139] Cantrell v. Knox County Bd. of Educ., 53 S.W.3d 659 [157 Educ. L. Rep. 414] (Tenn. 2001).

[140] Deaver v. Bridges, 47 S.W.3d 549 [155 Educ. L. Rep. 928] (Tex. App. 2000).

[141] Bellefonte Area Sch. Dist. v. Deak, 779 A.2d 1240 [157 Educ. L. Rep. 231] (Pa. Commw. Ct. 2001).

[142] Welch v. Oakland Unified Sch. Dist., 111 Cal.Rptr.2d 374 [156 Educ. L. Rep. 277] (Cal. Ct. App. 2001).

[143] Dellith v. Oneonta City Sch. Dist., 720 N.Y.S.2d 637 [151 Educ. L. Rep. 228] (N.Y. App. Div. 2001).

The Supreme Court of Judicial Appeals of West Virginia upheld a school board's filling the position of supervisor of maintenance with a person with less seniority.[144] The court agreed that the board could look beyond the plaintiff's having passed a state competency test and examining his qualifications in comparison with those of the person selected. The court maintained that since the person selected had more educational qualifications, the board was free to choose him even though he had only six years as a board employee compared with the plaintiff's twenty-seven years of experience.

In a case involving a nonpublic school, an appellate court in Connecticut affirmed that the decision of officials in a Catholic high school not to renew the contract of a full-time counselor was not arbitrable.[145] The court reasoned that, under the teachers' collective bargaining agreement, contracts of probationary employees were not subject to arbitration.

Administrative Regulations and Statutory Provisions

In a complicated set of facts regarding the seniority of two bus drivers, the Supreme Court of Appeals of West Virginia held that a bus driver was entitled to seniority for work performed even though the assignment was based on inaccurate information.[146] The court offered that the driver could not be penalized for an error in an assignment as long as he was not a party to the resulting miscalculation.

An appellate court in Louisiana affirmed that school employees were protected by the state's pay statute from having their salaries reduced by shortening their work year.[147] The court judged that the statute prohibited school boards from paying annual salaries that are less than the amount that an employee received in the immediately preceding year.

In the first of two cases dealing with transfers or assignments, an appellate court in Colorado upheld a principal's transfer of a teacher to another high school.[148] The teacher, who alleged that state law permitted only school boards to make such a transfer, lost in his mandamus action. The court believed that state law governing the transfer of teachers did not grant authority exclusively to school boards.

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[144] Hancock County Bd. of Educ. v. Hawken, 546 S.E.2d 258 [153 Educ. L. Rep. 983] (W. Va. 1999).

[145] Sacred Heart Teachers' Ass'n v. Sacred Heart High Sch. Corp., 782 A.2d 227 [158 Educ. L. Rep. 386] (Conn. Ct. App. 2001).

[146] Hall v. Bd. of Educ., 541 S.E.2d 624 [151 Educ. L. Rep. 293] (W. Va. 2000).

[147] Baldwin v. Orleans Parish Sch. Bd., 784 So. 2d 303 [154 Educ. L. Rep. 705] (La. Ct. App. 2001).

[148] Lazuk v. Sch. Dist. No. 1, 22 P.3d 548 [153 Educ. L. Rep. 417] (Colo. Ct. App. 2000).

An appellate court in Louisiana affirmed that a school board complied with a state statute requiring teachers returning from sabbaticals to be reassigned to their same jobs at the same schools.[149] Pursuant to a mandamus order reinstating a teacher to his former position, the board notified him that he would be returned to his job and sent him a letter reassigning him to a comparable position at another school. The teacher lost in his contempt proceeding because the statute did not specify that the return to the same position and school had to be for a period equivalent to the length of the sabbatical leave.

An appellate court in Arkansas upheld a teacher's right to sue based on a state law that authorized up to one year's paid leave of absence for an assault or criminal act committed against a teacher.[150] The teacher filed suit after she discovered that one or more of her students placed rat poison and straight pins in her glass of iced tea. When the teacher's physician diagnosed a number of ailments that would keep her from working for one to four years, the board required her to use sick leave and, when that was gone, she had no choice but to retire. Insofar as the board failed to provide the teacher with the statutory leave of absence, the court awarded her one year's pay and directed the board not to deduct the money she received for disability retirement.

In the first of two cases addressing procedural rights, an appellate court in Massachusetts affirmed that a principal was not entitled to the statutory provision accorded to professional teachers.[151] The court posited that the 1995 amendments to the state's Education Reform Act provided that a nonrenewed principal was only entitled to the sixty days' notice that he received.

A school bus driver challenged the denial of his request for a pretermination hearing. An appellate court in New York reversed in favor of the driver in ruling that he was entitled to a pretermination hearing under state law because his twenty-six-week probationary term expired before he was discharged.[152]

In the first of three cases dealing with sick or vacation leave, a first-grade teacher in Louisiana was successful in her claim that state law entitled her to sick leave without a reduction in pay and/or accrued sick leave days for the entire period of her disability. An appellate court affirmed that the injuries that the teacher suffered after she fell down due to contact with a student brought her within the state law ensuring that teachers should not suffer adverse financial harm from such injuries.[153]

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[149] Taube v. St. Charles Parish Sch. Bd. , 787 So. 2d 377 [155 Educ. L. Rep. 976] (La. Ct. App. 2001).

[150] Moore v. Pulaski County Special Sch. Dist., 43 S.W.3d 204 [153 Educ. L. Rep. 989] (Ark. Ct. App. 2001).

[151] Downing v. City of Lowell, 741 N.E.2d 469 [150 Educ. L. Rep. 477] (Mass. Ct. App. 2001).

[152] Wamsley v. E. Ramapo Cent. Sch. Dist. Bd. of Educ., 723 N.Y.S.2d 53 [152 Educ. L. Rep. 249] (N.Y. App. Div. 2001).

[153] Lott v. St. Martin Parish Sch. Bd., 784 So. 2d 838 [154 Educ. L. Rep. 709] (La. Ct. App. 2001).

An appellate court in Arkansas affirmed that a teacher was not entitled to payment for the value of her accrued sick leave.[154] Under the state's Teacher's Minimum Sick Leave Law, the court agreed that whether teachers should be compensated for unused sick leave was up to school boards.

In Ohio, an appellate court affirmed that a school board improperly denied a bus mechanic the opportunity to take accrued vacation time during the school year.[155] In concluding that the board rejected the mechanic's request to use vacation time, the court agreed that it violated a state law granting nonteaching employees, not the board, the right to schedule the use of accrued vacation time.

The first of two cases involving health benefit issues arose in California where an appellate court asserted that state law entitled a part-time certificated teacher to receive the health benefits accorded to full-time employees.[156] The court was of the opinion that a provision in a collective bargaining agreement permitting proration of health benefits for part-time teachers violated state law.

In New Jersey, a retired teacher successfully challenged the denial of his request for health benefits. An appellate court noted that the teacher, who worked for three different state pension systems involving local school districts and state institutions of higher learning for over thirty-one years, was entitled to aggregate his membership for health benefit purposes.[157]

Employees were successful in three cases involving workers' compensation. The Supreme Court of Ohio affirmed that a probationary teacher who was injured at the end of the school year was entitled to a workers' compensation award of temporary total disability when she was unable to perform her usual summer job.[158] The court explained that neither receiving a twelve-month salary nor prorating summer income diminished the teacher's claim.

An appellate court in Louisiana was satisfied that a teacher who was assaulted by a student was entitled to both workers' compensation and assault pay benefits.[159] The court decided that the teacher was entitled to both kinds of benefits as long as their total did not exceed her pre-injury salary and/or earnings.

In a second case from Louisiana, an appellate court wrote that a teacher who was injured at work was entitled to receive temporary total disability benefits during the summer, along with her regular salary.[160] The court pointed out that, while the teacher's salary represented nine months of work, it was spread out through the summer.

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[154] Turnbough v. Mammoth Spring Sch., 45 S.W.3d 430 [154 Educ. L. Rep. 690] (Ark. Ct. App. 2001).

[155] Johnson v. N. Union Local Sch. Dist. Bd. of Educ., 750 N.E.2d 1233 [155 Educ. L. Rep. 794] (Ohio Ct. App. 2001).

[156] Praiser v. Biggs Unified Sch. Dist., 104 Cal.Rptr. 551 [151 Educ. L. Rep. 198] (Cal. Ct. App. 2001).

[157] Barron v. State Health Benefits Comm'n, 779 A.2d 460 [156 Educ. L. Rep. 1170] (N.J. Super. Ct. 2001).

[158] State *ex rel.* Crim v. Ohio Bureau of Workers' Comp., 751 N.E.2d 990 [155 Educ. L. Rep. 1324] (Ohio 2001).

[159] Anderson v. Orleans Parish Sch. Bd., 792 So.2d 943 [156 Educ. L. Rep. 1455] (La. Ct. App. 2001).

Employees were not successful in recovering workers' compensation benefits in three cases. The Supreme Court of Texas dismissed the retaliatory action complaint of a custodian whose school board dismissed him after he received workers' compensation.[161] The court found that no court in the state could have subject matter jurisdiction since the custodian had not exhausted administrative remedies.

A custodian in Louisiana failed to persuade an appellate court that a mopping accident caused the disability for which he claimed workers' compensation.[162] In reversing an award in favor of the custodian, the court ascertained that he sustained a prior back injury for which he received benefits and that he failed to report it to his physicians or employer.

In an interesting case from Louisiana determining whether injured employees' exclusive remedy lay under workers' compensation, an appellate court affirmed that their injuries did not arise in the course of employment.[163] The court indicated that the employees, who worked for a food service that provided meals to the Archdiocese of New Orleans, were injured when the private car that they were driving in on the way to a conference was in an accident. The court added that since attendance at the conference was voluntary, the only remedy that the plaintiffs had was against the driver and his insurance company.

A considerable number of cases examined questions related to retirement wherein a threshold issue is eligibility. An appellate court in Pennsylvania affirmed that school employees who were off work and receiving workers' compensation for work-related injuries were not eligible for disability annuity benefits under the state's retirement system.[164] The court agreed that the employees were ineligible for the benefits because, under state law, they were not receiving remuneration for actual work performed.

In Minnesota, an appellate court affirmed the dismissal of a complaint filed by retired teachers that the state's Teachers Retirement Association unconstitutionally impaired their contracts.[165] The court agreed that since the teachers had not retired within the statute of limitations that began to run when the statutory changes were made, they were not eligible for the early retirement benefits.

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[160] Thomas-Young v. Allen Parish Sch. Bd., 780 So.2d 1273 [152 Educ. L. Rep. 865] (La. Ct. App. 2001).

[161] Wilmer Hutchins Indep. Sch. Dist. v. Sullivan, 51 S.W.3d 293 [156 Educ. L. Rep. 337] (Tex. 2001).

[162] Thompson v. Orleans Parish Sch. Bd., 786 So. 2d 128 [155 Educ. L. Rep. 948] (La. Ct. App. 2001).

[163] Haywood v. Dugal, 772 So. 2d 240 [149 Educ. L. Rep. 949] (La. Ct. App. 2000).

[164] Trakes v. PSERS, 768 A.2d 357 [151 Educ. L. Rep. 964] (Pa. Commw. Ct. 2001).

[165] Jacobson v. Bd. of Trs. of the Teachers Ret. Ass'n, 627 N.W.2d 106 [154 Educ. L. Rep. 670] (Minn. Ct. App. 2001).

An appellate court in New York affirmed that a 50 percent cost-saving provision did not require adding the cost of hiring a substitute teacher.[166] In applying the state's early retirement incentive law, the court held that, since a teacher failed to achieve the 50 percent cost savings, she was not eligible for an early retirement benefit.

In Pennsylvania, a teacher challenged the denial of her request for early retirement. An appellate court affirmed that the teacher was not eligible for early retirement because she had failed to file within the statutory deadline.[167]

A case from Washington turned on a superintendent's retirement date. An appellate court declared that since the superintendent's announced retirement date was changed by a preexisting agreement whereby he continued to work for the district for three years, he was overpaid pension benefits.[168]

The Supreme Court of Mississippi affirmed an earlier judgment overruling a decision of the state retirement system's board that a teacher with a long history of medical problems was entitled to medical disability retirement.[169] The court maintained that, even though the teacher continued to work for eleven years with the medical problems, the evidence of her severe pain was subjective.

An appellate court in Michigan upheld the judgment of the Public Employees Retirement Board that a retired teacher's lump sum awards were compensation for purposes of calculating retirement benefits.[170] The court agreed that since the payments covered medical care and retraining expenses, rather than disbursements for not being able to work, they did not qualify as compensation under state law.

Several cases dealt with retroactive membership in the state retirement system. Employees in New York[171] and Missouri[172] were able to purchase retroactive retirement credits after they persuaded courts that their school boards did not have procedures in place to notify them about membership in their state systems.

A teacher who served as long-term substitute for one year prior to being hired to a full-time position was able to purchase retirement credit for that year even though she worked for a private corporation that provided substitute teachers. An appellate court in Pennsylvania remarked that the substitute functioned as a school board employee because the district paid for her salary, provided all assignments, and supervised her work.[173]

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[166] Mastropietro v. Bd. of Educ., Mechanicville City Sch. Dist., 724 N.Y.S.2d 105 [153 Educ. L. Rep. 349] (N.Y. App. Div. 2001).

[167] Forman v. Pub. Sch. Employees' Ret. Bd., 778 A.2d 778 [156 Educ. L. Rep. 650] (Pa. Commw. Ct. 2001).

[168] Hertzke v. State Dep't of Ret. Sys., 18 P.3d 588 [151 Educ. L. Rep. 284] (Wash. Ct. App. 2001).

[169] Pub. Employees' Ret. Sys. v. Marquez, 774 So. 2d 421 [150 Educ. L. Rep. 567] (Miss. 2000).

[170] Ronan v. Mich. Pub. Sch. Employees Ret. Sys., 629 N.W.2d 429 [155 Educ. L. Rep. 837] (Mich. Ct. App. 2001).

[171] Licari v. Bd. of Educ., 721 N.Y.S.2d 372 [151 Educ. L. Rep. 550] (N.Y. App. Div. 2001).

[172] Bettis v. Potosi R-III Sch. Dist., 51 S.W.3d 183 [156 Educ. L. Rep. 329] (Mo. Ct. App. 2001).

In an interesting case from Ohio, a federal trial court awarded a school employee who was dismissed for cheating on the administration of a scholastic achievement test over $80,000 from the superintendent.[174] At the same time, the court rejected the employee's claim that the superintendent make up for his lost retirement plan contributions. According to the court, no legal authority could require the school board to accept money from a former employee so that it could be funneled into the retirement system as if it were its own contribution.

Employees unsuccessfully sought unemployment benefits in all but one of the six cases on point. The Supreme Court of New Hampshire reversed an unemployment compensation award to part-time school bus drivers. The court ruled that the drivers could not receive benefits for a week in February when schools were regularly closed.[175] Similarly, an appellate court in Missouri agreed that bus drivers were not eligible for benefits during the Christmas holiday and school closures in bad weather[176] while an appellate court in Colorado affirmed the denial of benefits to food service workers during summer break since summer is not an "academic term or period."[177]

In New York, an appellate court affirmed that a former teacher was ineligible for benefits.[178] The court denied the teacher's request because she voluntarily resigned for personal and noncompelling reasons.

An appellate court in Pennsylvania upheld denial of benefits to a teacher who was dismissed for willful misconduct.[179] The board released the teacher after she brought three shotguns to school in her car.

In the one successful unemployment compensation eligibility case, an appellate court in New Jersey reversed a finding that a twelve-month part-time employee was not eligible for benefits.[180] The court reasoned that the state statute making nine-month part-time employees ineligible during the summer did not apply to twelve-month employees.

The final case involving unemployment compensation benefits arose in New York. An appellate court affirmed an order directing a substitute teacher, who misrepresented his claim in seeking benefits, to make a repayment.[181]

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[173] Hawes v. Pub. Sch. Employees' Ret. Bd., 778 A.2d 1277 [156 Educ. L. Rep. 1147] (Pa. Commw. Ct. 2001).

[174] Welton v. Osborn, 124 F. Supp.2d 1114 [150 Educ. L. Rep. 208] (S.D. Ohio 2000).

[175] *In re* Manchester Transit Auth., 773 A.2d 640 [154 Educ. L. Rep. 888] (N.H. 2001).

[176] Young v. Ryder Student Transp. Servs., 50 S.W.3d 320 [155 Educ. L. Rep. 1481] (Mo. Ct. App. 2001).

[177] Herrera v. Indus. Claim Appeals Office of Colo., 18 P.3d 819 [151 Educ. L. Rep. 576] (Colo. Ct. App. 2000).

[178] *In re* Barry, 727 N.Y.S.2d 491 [155 Educ. L. Rep. 768] (N.Y. App. Div. 2001).

[179] Grieb v. Unemployment Comp. Bd. of Rev., 767 A.2d 1138 [151 Educ. L. Rep. 950] (Pa. Commw. Ct. 2001).

[180] Weber-Smith v. Bd. of Rev., 766 A.2d 1200 [151 Educ. L. Rep. 514] (N.J. Super. Ct. App. Div. 2001).

[181] *In re* Aloria, 717 N.Y.S.2d 696 [150 Educ. L. Rep. 236] (N.Y. App. Div. 2000).

The court observed that since the teacher worked on a per diem basis for an entire year and had a reasonable assurance of employment for the next year, he was not eligible for benefits.

Tenure

Tenure Status

The Court of Appeals of New York upheld the denial of tenure to a teacher who, between the time a school board voted to grant tenure and the beginning of the next academic year, admitted to consuming alcohol at a school-sponsored event.[182] The court agreed that since it becomes effective only at the beginning of the next year, the board could rescind an award of tenure up to that time.

The Supreme Court of Ohio determined that school bus drivers with continuing contract status could not be laid off and have their positions abolished while their jobs were filled by nonpublic employees.[183] The court was of the view that the drivers were entitled to reinstatement to their continuing contract positions and to back pay equivalent to the hourly wages that they would have earned.

An appellate court in Illinois contended that the effect of statutory amendments eliminating tenure for principals in Chicago's public schools, later struck down as unconstitutional, left the law in force since this had occurred prior to their adoption.[184] The court commented that the principals had enforceable rights to continuing employment through tenure protections until such time as they were removed by a constitutionally valid law.

Tenure by Default or Acquiescence

A school librarian in New York unsuccessfully claimed that two years of part-time work should have counted toward tenure. In affirming the rejection of the librarian's claim for tenure by estoppel, the court noted that part-time work does not constitute probationary service for purposes of tenure.[185] The court added that, since the school board terminated the librarian's contract as a full-time employee at the end of three probationary years, without a fourth year, she had not acquired tenure.

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[182] Remus v. Bd. of Educ. for Tonawanda City Sch. Dist., 727 N.Y.S.2d 43 [155 Educ. L. Rep. 759] (N.Y. 2001).

[183] State *ex rel.* Boggs v. Springfield Local Sch. Dist. Bd. of Educ., 757 N.E.2d 339 [158 Educ. L. Rep. 435] (Ohio 2001).

[184] Jacobson v. Bd. of Educ. of Chi., 746 N.E.2d 894 [153 Educ. L. Rep. 726] (Ill. App. Ct. 2001).

[185] Roese v. Bd. of Educ. of the S. Country Cent. Sch. Dist., 724 N.Y.S.2d 501 [153 Educ. L. Rep. 950] (N.Y. App. Div. 2001).

Certification

Decertification, Revocation, or Suspension

The Supreme Court of New Hampshire upheld the revocation of a teacher's certificate based on a single guilty plea of simple assault on a minor female that occurred off school premises.[186] The court pointed out that the heart of the misdemeanor charge involved hugs and kisses at the teacher's home. In rejecting the teacher's claim that his conduct lacked a nexus to his job, the court explained that parents and school administrators would be reasonably concerned about the well-being and education of their children where he ignored a parental directive to cease such conduct with their daughter.

An appellate court in Pennsylvania upheld the revocation of a teaching certificate even though the state department of education failed to remand the case to the local school board for further investigation.[187] The court found that, under state law, the department could file a complaint against the teacher under its own authority when it learned of a statutory violation regardless of whether the board commenced an action.

Conclusion

Litigation involving employees continues to present a broad range of legal issues. The cases, which represent a fairly even distribution between state and federal courts, appear to be about evenly split between employees and school boards. Even though a significant number of cases involve federal constitutional and statutory issues in federal courts, a growing number of cases are litigated under state statutory and administrative provisions.

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[186] *In re* Appeal of Morrill, 765 A.2d 699 [150 Educ. L. Rep. 758] (N.H. 2001).

[187] Seltzer v. Dep't of Educ., 782 A.2d 48 [157 Educ. L. Rep. 790] (Pa. Commw. Ct. 2001).

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PUPILS

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Introduction

School boards and administrators work to understand and apply legal standards to the many issues they face in dealing with students and parents. At the same time, the courts continue to define the increasingly complex and often controversial matters surrounding attempts to ensure an equitable balance between the rights of students and the duty of school officials to provide a safe learning environment. In light of these conflicts, this chapter summarizes almost 150 cases affecting pupils and their parents. The majority of the cases address board practices affecting the constitutional rights of students, especially those related to religion, speech, sexual harassment, privacy, search and seizure, and due process. One case from this group involving a suspicionless drug-testing policy as a condition of participating in extracurricular activities was heard in June by the United States Supreme Court and will be reported in the next year's *Yearbook of Education Law*.

Issues Relating to Public School Attendance

Parents prevailed in a criminal proceeding that challenged their right to homeschool their children without being subject to evaluative visits by school officials. The parents appealed the denial of their request for attorney fees. The Supreme Judicial Court of Massachusetts noted that while the parents prevailed in showing that school officials interfered with their rights, their request for damages failed on the pivotal issue of whether the interference was effectuated by threats, intimidation, or coercion.[1] The court affirmed that the efforts of school officials to initiate a criminal prosecution did not meet the threshold levels of physical force or the heavy-handed use of police power that is required for recovering attorney fees under state law.

In Tennessee, a father obtained a court order directing his former wife to enroll their child in a public school because she did not have the time to manage the child's educational needs through homeschooling. On further review, an appellate court affirmed that judicial intervention was appropriate since evidence supported the finding that homeschooling was not viable.[2]

The parents of parochial school children who received free transportation from their public school board unsuccessfully challenged the rejection of their request to reestablish a school bus stop in front of their house. An appellate panel in Pennsylvania affirmed that a trial court properly dismissed the action since it lacked jurisdiction over the dispute.[3]

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[1] Brunelle v. Lynn Pub. Schs., 740 N.E.2d 625 [150 Educ. L. Rep. 241] (Mass. 2001).

[2] Anderson v. Anderson, 56 S.W.3d 5 [158 Educ. L. Rep. 469] (Tenn. Ct. App. 1999).

[3] Morningstar v. Mifflin County Sch., 760 A.2d 1221 [148 Educ. L. Rep. 417] (Pa. Commw. Ct. 2000).

Compulsory Attendance

Wyoming has a statute that provides for the issuance of an exemption from immunization requirements for all children attending public and private K-12 schools if based on a religious objection. When a state health officer responded to a mother's request for a religious exemption by asking her to define her beliefs fully and to explain how she acted on her faith in a consistent manner, she responded with a second written request that was denied. After being informed that her daughter would not be able to attend school unless immunized for hepatitis B, the mother sought administrative and judicial review. The Supreme Court of Wyoming maintained that the state's legislature clearly and unambiguously mandated that an exemption must be issued without inquiry into the sincerity of religious beliefs.[4] Although the court pointed out that there was a genuine concern for increased requests for exemptions resulting in a potential for improper evasion of immunization, it relegated responsibility for dealing with the problem to the legislature. The court emphasized its presumption that parents generally act in the best interest of the physical and spiritual health of their children.

A day later, the Supreme Court of Wyoming addressed the same statutory exemption when parents challenged the denial of their request for a waiver on the ground of a medical contraindication. The state board of health rejected the conclusion of the student's doctor that the child would have experienced adverse reactions to immunizations in favor of its own position that the parents failed to provide a substantive medical history of vaccination contraindication. Just as in the previous case, the court recognized the statute's mandatory plain and understandable language in reasoning that the parents and their family physician did everything necessary to warrant issuance of a medical waiver from immunization.[5]

In the first of two cases from New York that also involved immunization, a federal trial court denied parents' motion for preliminary injunction against a school board's refusal to permit their children to attend classes unless they were immunized.[6] The court ruled that the parents were not entitled to the exemption under a state law which exempts persons whose opposition to immunization stems from genuine and sincere religious beliefs because the parents' objections were medical, not religious.

A child's representative filed a breach of contract against a grammar school that refused to permit him to attend classes because officials would not recognize his claim for a religious exemption to the state immunization requirement. An appellate court affirmed the denial of the school's motion to dismiss.[7] The court agreed that since the religious exemption was applicable to private and parochial schools, the child could file a suit to enforce his right to a religious exemption from immunization. The court added that the child's likelihood of success on the merits of his case, coupled with possible irreparable injury to his First Amendment rights, entitled him to a preliminary injunction.

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[4] *In Re* LePage, 18 P.3d 1177 [151 Educ. L. Rep. 605] (Wyo. 2001).

[5] Jones v. State Dep't of Health, 18 P.3d. 1189 [151 Educ. L. Rep. 610] (Wyo. 2001).

[6] Farina v. Bd. of Educ. of N.Y., 116 F. Supp.2d 503 [148 Educ. L. Rep. 168] (S.D.N.Y. 2000).

[7] Bowden v. Iona Grammar Sch., 726 N.Y.S.2d 685 [154 Educ. L. Rep. 921] (N.Y. App. Div. 2001).

In New Jersey, a local school board disputed the state board of education allowing a foreign student who was living with relatives to receive a free public education under a hardship provision. The student, an American citizen living with his parents in Korea, moved back to the United States after his father lost his job. An appellate court affirmed that the state board acted properly since there was substantial credible evidence that the student qualified for a free education.[8]

Transfer of Students

In the first of four cases from Massachusetts, parents continued to challenge Boston's elementary school assignment process on the ground that their children were denied preferred assignments based on race. The First Circuit held that several plaintiffs lacked standing since they had not applied to change schools.[9] Insofar as the court asserted that the remaining plaintiffs may have had a damages claim, it refused to dismiss these allegations and set the course for future litigation by allowing discovery on the issue of standing.

Parents of white children in Boston unsuccessfully filed suit claiming that their children were denied their preferred school assignments because of their race. The First Circuit decided that even though the earlier order had the practical effect of denying an injunction, it was not immediately appealable since the parents failed to demonstrate the existence of serious harm.[10]

In another case from Massachusetts, parents challenged the validity of their school board's plan to improve schools by preserving racial diversity while ending racial isolation and imbalance by limiting student transfers. In response to the board's motion to dismiss, the federal trial court agreed that Eleventh Amendment immunity protections prevented the parents from suing unconsenting officials in a federal venue because the Commonwealth was not a "program or activity" for purposes of title VI liability.[11]

Parents challenged a school board's transfer policy that was created in order to gain additional funding from the Massachusetts Racial Imbalance Act as based on unequal treatment due to race. The federal trial court decreed that while the parents lacked standing to seek an injunction since they had already been granted transfers for their children, they could seek nominal damages under their claim of unequal treatment based on race.[12]

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[8] P.B.K. v. Bd. of Educ., 778 A.2d 1124 [156 Educ. L. Rep. 1128] (N.J. Super. App. Div. 2001).

[9] *In re* Boston's Children First, 244 F.3d 164 [153 Educ. L. Rep. 20] (1st Cir. 2001).

[10] Anderson v. City of Boston, 244 F.3d 236 [153 Educ. L. Rep. 29] (1st Cir. 2001).

[11] Comfort *ex rel.* Neumyer v. Lynn Sch., 131 F. Supp.2d 253 [151 Educ. L. Rep. 813] (D. Mass. 2001).

[12] Comfort v. Lynn Sch. Comm., 150 F. Supp.2d 285 [155 Educ. L. Rep. 506] (D. Mass. 2001).

In Washington, parents challenged a school board's open choice assignment plan which used a racial integration tie-breaker. On cross-motions for summary judgment, the federal trial court posited that since the assignment plan did not grant a preference as used in the state constitution, state statute, or federal law, it did not violate the state's civil rights act.[13] The court was convinced that since the use of race as an open choice policy tie-breaker served a compelling government interest and was narrowly tailored to do so, it did not violate equal protection.

Where a minor student moved into a school district in North Carolina while her mother remained in Illinois, a trial court refused to order the superintendent to enroll the child. On further review, an appellate court affirmed that since the unemancipated minor did not demonstrate that her domicile was different from her mother's, residency requirements that were uniformly applied did not violate her rights to equal protection or due process.[14]

Tuition and Fees

A school board in Ohio sought further review of the dismissal of its complaint charging parents with fraud and seeking to recover tuition from them after they filed false documentation of residence and enrolled their nonresident children in its schools. An appellate panel reinstated the complaint on the basis that the trial court had subject matter jurisdiction over the fraud and tuition claims.[15]

In New York, a city board of education sued a county for tuition reimbursement regarding amounts it paid for students who resided there prior to being sent to a facility that provided temporary care for children who were placed in detention. On further review of the dismissal of the tuition reimbursement charge against the county, an appellate court affirmed that while the city board presented a viable claim against the county for partial tuition reimbursement, the statute of limitations barred recovery of tuition costs for a portion of the expenditures during the time period in dispute.[16]

Private and Parochial Schools

In a case from Pennsylvania, a student claimed damages for psychological and physical injury surrounding horseplay by employees at his private school, which specialized in the education of young sex offenders. The Third Circuit affirmed the denial of his claim and the panel agreed that since the school was not a state actor, the student could not establish grounds for section 1983 liability, and the trial court could reject the testimony of an expert that the horseplay constituted sexual abuse.[17]

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[13] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp.2d 1224 [153 Educ. L. Rep. 267] (W.D. Wash. 2001).

[14] Graham v. Mock, 545 S.E.2d 263 [153 Educ. L. Rep. 797] (N.C. Ct. App. 2001).

[15] School Dist. Bd. of Educ. v. Cloud, 738 N.E.2d 473 [148 Educ. L. Rep. 1031] (Ohio Ct. App. 2000).

[16] Board of Educ. v. County of Westchester, 724 N.Y.S.2d 422 [153 Educ. L. Rep. 944] (N.Y. App. Div. 2001).

A mother in Wyoming sought further review of her unsuccessful civil rights suit based on her daughter's being removed from her custody and placed in a psychological care facility as a suicide risk as well as herself being subject to an investigation on charges of abuse and neglect. The Tenth Circuit affirmed the dismissal of charges against a tribal agency and its officials, employees of the Indian Health Services, and a private school.[18] The court explained that the tribal agency did not waive sovereign immunity and officials and employees of the state agency and a counseling service were not state actors for the purposes of section 1983.

Parents who lived in a school district that contracted with a private school because it did not operate a high school sued various officials when their son was suspended for seventeen days for using profanity directed at a teacher. The federal trial court in Maine initially denied the private school's motion to dismiss insofar as it was unable to determine whether it and its employees were state actors who could raise a defense of qualified immunity.[19] The same court subsequently granted the private school's motion for summary judgment since neither it, not its employees, was a state actor.[20] The court believed that in the absence of underlying constitutional violations, the public school board was not liable.

Substantive Rights of Students

First Amendment

Religious Rights

The sponsor of a Christian club for children in New York filed a section 1983 action against a public school, alleging that the superintendent's refusal to allow it to use school facilities violated the right to free speech. After the Second Circuit affirmed a grant of summary judgment in favor of the superintendent, the Supreme Court, in *Good News Club v. Milford Central School*,[21] reversed in favor of the plaintiffs. The Court held that the exclusion of the club from meeting after hours at the school based on its religious nature was unconstitutional viewpoint discrimination, violating the Establishment Clause.

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[17] Robert S. v. Stetsom Sch., 256 F.3d 159 [155 Educ. L. Rep. 130] (3rd Cir. 2001).

[18] E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297 [157 Educ. L. Rep. 15] (10th Cir. 2001).

[19] Logiodice v. Trs. of Me. Cent. Inst., 135 F. Supp.2d 199 [152 Educ. L. Rep. 681] (D. Me. 2001).

[20] Logiodice v. Trs. of Me. Cent. Inst., 170 F. Supp.2d 16 [158 Educ. L. Rep. 651] (D. Me. 2001).

[21] 533 U.S. 98 [154 Educ. L. Rep. 45] (2001).

In a similar case from Louisiana, a federal trial court granted a motion for summary judgment in favor of a group that questioned a board's building-use policy when it was denied the opportunity to have a prayer meeting in a school building. On further review, the Fifth Circuit reversed in specifying that the board did not create a public forum by allowing buildings to be used for civic and recreation meetings and entertainment but not for partisan political activity, religious services, and for-profit fundraising.[22] However, the Supreme Court vacated and remanded the Fifth Circuit's judgment[23] in light of *Good News*.

When parents in New York sought declaratory and injunctive relief for violations of the First Amendment rights of their children, a federal trial court decided that school officials should not have permitted a doll of Ganesha (an Indian God), worry dolls, Earth Day, and a "Listening to Nature" tape in classes. On further review, the Second Circuit affirmed in part and vacated in part.[24] The court recognized that the case was moot because the children no longer attended the schools where the activities took place; however, celebrating Earth Day did not violate the First Amendment.

In New Jersey, an elementary school student and his mother sought further review of a grant of summary judgment in favor of a board of education and various officials who temporarily removed the student's poster of Jesus from a class display and prevented him from reading a story with religious content to classmates. The Third Circuit affirmed the judgment for the defendants on the First Amendment claims.[25] At the same time, the panel instructed the trial court to provide the plaintiffs with an opportunity to amend their complaint to include personal involvement of the individuals in the poster incident.

Students and parents in Virginia unsuccessfully challenged a statute mandating a "minute of silence" in public schools. The Fourth Circuit affirmed that the statute did not violate the Establishment Clause since it had the two secular purposes of accommodating nonreligious meditation and fostering the liberties secured by the Constitution by accommodating religion.[26] The court was of the view that the statute was facially neutral toward religion and did not create excessive governmental entanglement because the state did not impose a substantive requirement during the silence.

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[22] Campbell v. St. Tammany Parish Sch. Bd., 231 F.3d 937 [148 Educ. L. Rep. 715] (5th Cir. 2000).

[23] Campbell v. St. Tammany's Sch. Bd., 121 S. Ct. 2518 [154 Educ. L. Rep. 73] (2001).

[24] Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49 [152 Educ. L. Rep. 86] (2nd Cir. 2001), *cert. denied*, Dibari v. Bedford Cent. Sch. Dist., 122 S. Ct. 68 (2001).

[25] C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198 [148 Educ. L. Rep. 585] (3rd Cir. 2000), *cert. denied sub nom* Hood v. Medford Township Bd. of Educ., 533 U.S. 915 (2001).

[26] Brown v. Gilmore, 258 F.3d 265 [155 Educ. L. Rep. 1031] (4th Cir. 2001), *cert. denied*, 122 S. Ct. 465 (2001).

The Eleventh Circuit handed down another ruling in an on-going dispute from Florida over a school board policy which permits graduating seniors to vote on whether to have unrestricted student-led messages at the beginning and end of graduation ceremonies. In *Adler v. Duval County School Board*, the Supreme Court vacated and remanded[27] in favor of the board for further consideration in light of *Sante Fe Independent School District v. Doe*.[28] On remand, the Eleventh Circuit declared that the policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies did not facially violate the Establishment Clause.[29]

Both parties sought further review after a federal trial court permanently enjoined the enforcement of a statute from Alabama which permitted nonsectarian, nonproselytizing student-initiated prayers at school events. The Eleventh Circuit affirmed in part, vacated in part, and remanded on the basis that the injunction was overbroad to the extent that it equated all student speech in a public context at school with state speech.[30] The court offered that a school board may not prohibit genuinely student-initiated speech nor place restrictions on this speech which exceeds the limits placed on students' secular speech.

When school officials denied a student's request to include religious proselytizing comments in his salutatorian commencement address, he unsuccessfully sued the board and school officials for violating his freedom of religion and speech and his equal protection rights. A federal trial court in California granted the defendants' motions for summary judgment in ascertaining that the Eleventh Amendment protected them in their official capacities.[31]

In Pennsylvania, a pastor unsuccessfully claimed that a winter holiday display in an elementary school with references to Chanukah and Kwanza, but not Christmas, violated the Establishment Clause. A federal trial court dismissed this claim in divining that the display, and an accompanying program, did not prefer one religion over others or favor religion over nonreligion.[32]

When two courthouses and a school board in Kentucky posted the Ten Commandments, a federal trial court issued a preliminary injunction ordering their removal.[33] The defendants then changed the display to include other historical documents including the Magna Carta, the Bill of Rights, and the Mayflower Compact. The court struck down the larger display on the basis that the Ten Commandments had a religious rather than a secular purpose and that the history of the display indicated that its purpose was to endorse religion.

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[27] 531 U.S. 801 [148 Educ. L. Rep. 31] (2000).

[28] 530 U.S. 290 [145 Educ. L. Rep. 21] (2000).

[29] Adler v. Duval County Sch. Bd., 250 F.3d 1330 [154 Educ. L. Rep. 80] (11th Cir. 2001), *cert. denied*, 122 S. Ct. 664 (2001).

[30] Chandler v. Siegelman, 230 F.3d 1313 [148 Educ. L. Rep. 138] (11th Cir. 2000), *reh'g denied*, 248 F.3d 1032 [153 Educ. L. Rep. 528] (11th Cir. 2001), *cert. denied*, 533 U.S. 916 (2001).

[31] Lassonde v. Pleasanton Unified Sch. Dist., 167 F. Supp.2d 1108 [158 Educ. L. Rep. 307] (N.D. Cal. 2001).

[32] Sechler v. State Coll. Area Sch. Dist., 121 F. Supp.2d 439 [149 Educ. L. Rep. 141] (M.D. Pa. 2000).

Parents of students at a charter school sued a school board and its corporate manager, alleging that they violated federal and state constitutional prohibitions against the establishment of religion by allowing a parent prayer group to use the school's "parent room"; permitting teachers to participate in prayer on school property before school; allowing community groups, including religious groups, to distribute materials to students; using religious material in mandatory teacher in-service; presenting religious music at the employee Christmas party; teaching a secular moral focus curriculum; and allegedly teaching creationism. In granting the defendants' motion for summary judgment, a federal trial court in Michigan was satisfied that the parents had injured party standing to obtain redress only for actions directly affecting their children.[34] The court remarked that policies allowing parent or community groups to meet on school grounds or distribute material to students did not violate the Establishment Clause or the state constitution, that the moral focus curriculum did not violate the federal or state constitutions, and the record did not suggest that creationism was taught as an accepted scientific theory at the school.

In Georgia, an appellate court affirmed that a school board did not violate a student's right to religious freedom by using a biology textbook that she alleged denigrated her belief in creationism.[35] According to the court, the book did not establish a religion since it did not sponsor religious actions or beliefs and it served the secular purpose of educating biology students.

Freedom of Speech

Parents in Texas sought further review of the rejection of their challenge to a school's mandatory uniform policy. The Fifth Circuit affirmed that the policy did not violate the First Amendment, even assuming it regulated expressive speech.[36] The court indicated that the policy did not implicate the parents' fundamental due process right in the upbringing of their children and that its opt-out provision, requiring them to complete a questionnaire, did not violate the Free Exercise and Establishment Clauses.

Similarly, high school students and their parents unsuccessfully sued a school board and various officials, charging that a dress code violated their rights. A federal trial court in Kentucky granted the defendants' motion for summary judgment after concluding that enforcing the dress code did not violate the students' First Amendment rights.[37]

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[33] ACLU v. McCreary County, 145 F. Supp.2d 845 [155 Educ. L. Rep. 243] (E.D. Ky. 2001).

[34] Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp.2d 897 [148 Educ. L. Rep. 208] (W.D. Mich. 2000).

[35] Moeller v. Schrenko, 554 S.E.2d 198 [158 Educ. L. Rep. 850] (Ga. Ct. App. 2001).

[36] Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 [158 Educ. L. Rep. 36] (5th Cir. 2001).

A high school student in Iowa unsuccessfully sued her school board and various officials, alleging that they violated her right to free speech by making her continued participation on the sophomore basketball team conditional on her apologizing to teammates for writing a letter which criticized the varsity coach. On further review, the Eighth Circuit affirmed that the student's letter, containing the word "bullshit," constituted insubordinate speech toward her coaches and was subject to disciplinary action under school and team handbooks.[38]

In a similar case from Ohio, a federal trial court granted a school board's motion to dismiss the free speech claim of a sixth-grade student who was disciplined for writing an obscene, sexually related message in a female peer's yearbook. The parents claimed that school officials violated their son's rights since others did not receive a similar punishment of written reprimand and double detention.[39] The court stated that the parents did not present viable equal protection or First Amendment claims.

A high school teacher, students, and a publisher sought to enjoin a principal's directive to remove a pamphlet about banned books from a classroom door. A federal trial court in Virginia denied injunctive relief in reflecting that the balance of harms favored the principal since no job action or student discipline was threatened, the students continued to have access to the information inside the classroom, and injunctive relief would have impaired the principal's authority to run the school.[40] The court contended that the claim was unlikely to succeed on its merits because the posted information was considered part of the school curriculum, not protected speech.

Where school officials rejected the petition of a third-grade student that asked them not to schedule a field trip to a circus since it hurt animals, she claimed that they violated her First Amendment rights and subjected her to emotional distress because other children teased her about her request. In adopting a magistrate's recommendations, a federal trial court in Pennsylvania decreed that since the student had not followed appropriate procedures and her petition disrupted class, her suit was without merit.[41] The court judged that the board president could not be liable since he had not participated in the matter and that the board was not at fault for the actions of a teacher and the principal. Further, the court agreed that the teacher and principal had qualified immunity since no First Amendment rights were clearly established.

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[37] Long v. Bd. of Educ. of Jefferson County, 121 F. Supp.2d 621[149 Educ. L. Rep. 157] (W.D. Ky. 2000).

[38] Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 [153 Educ. L. Rep. 595] (8th Cir. 2001).

[39] Doe v. DePalma, 163 F. Supp.2d 870 [157 Educ. L. Rep. 628] (S.D. Ohio 2000).

[40] Newton v. Slye, 116 F. Supp.2d 677 [148 Educ. L. Rep. 179] (W.D. Va. 2000).

[41] Walker-Serrano v. Leonard, 168 F. Supp.2d 332 [158 Educ. L. Rep. 334] (M.D. Pa. 2001).

In Minnesota, when a high school student wore a sweatshirt with the message "Straight Pride" to school and other students took offense to it, the school's principal told him not to wear it to school again because of safety concerns. After the student and his parents filed suit alleging that the principal violated his First Amendment rights, the federal trial court granted their request for a preliminary injunction, holding that strong evidence existed that the principal's action would be struck down as unreasonable.[42] The court noted that if the principal acted on a reasonable belief that the shirt would have resulted in substantial disruption and interference with school activities, then his behavior would have been constitutional. In the absence of such an indication, the court concluded that the student's freedom of expression was protected.

A student claimed that school officials neither protected him from harassment nor punished the peers who harassed him based on his participating in a gay rights program. The student, who transferred several times and was placed in a community college program which precluded him from receiving a high school diploma, sued the board and various officials under section 1983 for allegedly violating his rights under the First Amendment and title IX. The federal trial court in Nevada dismissed the section 1983 claims in declaring that they could be remedied under title IX.[43] The court ruled that the defendants did not have qualified immunity and the student could maintain a claim for punitive damages for violations of his rights under both the First Amendment and title IX.

A student, suspended from school and adjudicated delinquent as guilty of a misdemeanor under a state law which prohibits any person from abusing or insulting a teacher, challenged the statute as an overbroad impingement on her First Amendment rights. The Supreme Court of Arkansas reversed and dismissed in favor of the student in deciding that the legislature went too far in criminalizing undefined insulting or abusive remarks to a teacher irrespective of the time, place, or manner of the speech.[44]

In a case from Arkansas, a school board challenged a judgment in favor of a student who claimed that his being expelled for writing a composition allegedly threatening a peer violated his First Amendment right to free speech. The Eighth Circuit affirmed that since the essay was not a true threat, it was protected speech for which he could not be expelled.[45]

Where a juvenile was adjudicated delinquent for disorderly conduct, he sought further review. Reversing in favor of the student, the Supreme Court of Wisconsin was convinced that the juvenile's creative writing assignment was protected by the First Amendment, since he could not be prosecuted for disorderly conduct simply for describing his teacher's head being cut off.[46]

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[42] Chambers v. Babbitt, 145 F. Supp.2d 1068 [155 Educ. L. Rep. 252] (D. Minn. 2001).

[43] Henkle v. Gregory, 150 F.Supp.2d 1067 [155 Educ. L. Rep. 1126] (D. Nev. 2001).

[44] Shoemaker v. State, 38 S.W.3d 350 [152 Educ. L. Rep. 364] (Ark. 2001).

[45] Doe *ex rel.* Doe v. Pulaski County Spec. Sch., 263 F.3d 833 [156 Educ. L. Rep. 788] (8th Cir. 2001), *vacated and reh'd granted.*

Sexual Abuse and Harassment by Students

In a case from Kentucky, the Sixth Circuit affirmed a damages award in a student's title IX claim arising from severe and pervasive student-on-student sexual harassment.[47] The court agreed that since the student and her parents informed school officials of the harassment, but the educators failed to do anything, they were liable because they acted with deliberate indifference.

Where a mildly retarded student at a middle school was sexually molested by another boy in his special education class, his parents unsuccessfully alleged that school officials violated title IX. In granting the school board's motion for summary judgment, a federal trial court in Texas pointed out that it was not liable because officials were not deliberately indifferent, and this single instance was insufficient to trigger liability under title IX.[48] The court did not think that board officials had to remedy the harassment since their response was not clearly unreasonable.

A student who was sexually assaulted off-campus by peers unsuccessfully brought a tort action against a school board, charging that officials breached their duty to provide reasonable supervision by not notifying her that an after-school band practice was canceled. An appellate court in Louisiana affirmed a grant of summary judgment in favor of the board in positing that the student was not within the scope of protection which the board owed her at the time of the assault and that its actions were not the legal cause of her injuries.[49]

After being sexually assaulted on a school bus, a student sought further review of a grant of summary judgment in her negligence action against a school board. An appellate court in Ohio affirmed that the board had statutory immunity as a political subdivision of the state and that the child's injuries were not directly caused by the bus driver's negligent operation of the vehicle.[50] The court added that the board was not liable since the assault did not fall within an immunity exception for tort liability in connection with the performance of government functions.

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[46] *In re* Douglas D., 626 N.W.2d 725 [154 Educ. L. Rep. 312] (Wis. 2001).

[47] Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253 [148 Educ. L. Rep. 616] (6th Cir. 2000).

[48] Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp.2d 690 [155 Educ. L. Rep. 220] (E.D. Tex. 2001).

[49] Frederick v. Vermilion Parish Sch. Bd., 772 So. 2d 208, *writ denied*, 781 So. 2d 561 (La. 2001).

[50] Doe v. Dayton City Sch. Dist. Bd. of Educ., 738 N.E.2d 390 [148 Educ. L. Rep. 1026] (Ohio Ct. App. 1999).

Sexual Abuse and Harassment by Employees

Where a student in Virginia who was sexually abused by a teacher sued school officials, a federal trial court denied the principal's motion for summary judgment in her title IX suit. On further review, the Fourth Circuit affirmed that the principal was liable since he had actual or constructive knowledge of the risk of sexual molestation but reversed in favor of the superintendent, personnel director, and board since they lacked constructive knowledge of the molestation and did not act with deliberate indifference.[51] Further, the court reasoned that since the principal did not have actual knowledge of the molestation or power to take remedial action on its behalf, the student could not recover from the board under title IX.

In a case from Nebraska, a mother sued a school board and various officials to recover damages for the sexual molestation of her son by a former teacher. On further review of a grant of summary judgment in favor of the board, the Eighth Circuit affirmed that its entering into a confidential settlement agreement with the teacher rather than dismissing him outright for student molestation and providing him with a neutral letter of recommendation did not rise to the level of deliberate indifference warranting liability under section 1983 after he sexually molested another child in a different district.[52] The court observed the board did not possess sufficient control over the teacher, the student, and/or the place of the abuse to incur title IX liability for the second sexual molestation.

A student in Nebraska unsuccessfully sued a school board under title IX after completing a two-year sexual relationship with a teacher. A federal trial court granted the board's motion for summary judgment in relying on the fact that the student's failure to complain about the relationship/child abuse until after it ended did not provide strong enough evidence to support his claim that the board failed to receive, investigate, and act on the claim. The Eighth Circuit affirmed that the board could not be liable because it could not be inferred by a totality of the facts whether school officials had notice of the teacher's acts and failed to investigate.[53]

Students in Georgia sued a school board, principal, and former teacher, alleging that the teacher sexually molested them in violation of title IX, then challenged a grant of summary judgment in favor of the defendants. The Eleventh Circuit affirmed that the students failed to provide evidence that school officials knew of the molestation or that the principal and others acted with deliberate indifference.[54]

A former teacher sought to dismiss the claims of a student who alleged that, as a child, she was sexually molested by him several years earlier. The federal trial court in Maine partially denied the teacher's motion to dismiss on the ground that the former student had a due process claim under section 1983 and that the teacher was not protected by qualified immunity from these claims or for the charge of negligent infliction of emotional distress.[55] The court further denied the teacher's motion for partial summary judgment on the ground that material issues of fact remained unresolved with regard to the student's claim of intentional infliction of emotional distress.[56]

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[51] Baynard v. Malone, 268 F.3d 228 [158 Educ. L. Rep. 20] (4th Cir. 2001).

[52] Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773 [153 Educ. L. Rep. 600] (8th Cir. 2001).

[53] P.H. v. Sch. Dist. of Kansas City, Mo., 265 F.3d 653 [157 Educ. L. Rep. 42] (8th Cir. 2001).

[54] Davis *ex rel.* Doe v. Dekalb County Sch. Dist., 233 F.3d 1367[149 Educ. L. Rep. 376] (11th Cir. 2000), *cert. denied*, 532 U.S. 1066 (2001).

In Connecticut, a basketball player sued a school board and its members individually, alleging that a male coach sexually harassed her in violation of title IX, section 1983, and various state tort laws. The student claimed that officials refused to do anything about the coach's continuing and persistent pattern of offensive remarks and inappropriate physical contact that ultimately led her to quit the team, transfer to another school, and receive ongoing medical care and psychological treatment. The federal trial court declared that the weight of authority precludes title IX liability against individual board members.[57] Insofar as the student's section 1983 claims were based on the same facts as her title IX charge, the court dismissed the allegations against the board and district as a whole since constitutionally based claims are subsumed by the comprehensive enforcement scheme of title IX. The court did leave standing the student's section 1983 claims against school officials in their individual capacities.

A student manager alleged that she was sexually harassed by a coach over a period of three months and that even though she reported this conduct to the head football coach, a teacher, a counselor, and school administrators, their failure to stop the offensive behavior caused her to leave school and relapse into bulimia. In response to the student's section 1983 and state law claims against the board and various officials, a federal trial court in Pennsylvania dismissed the state claims against the board as well as the negligent hiring and supervision claims against the coach.[58] The court refused to dismiss the section 1983 claims in determining that they were not subsumed by title IX. The court ascertained that the coach was not entitled to qualified immunity since his intentional actions exceeded all possible bounds of decency and that other officials were not entitled to immunity since they failed to take action to prevent the harassment.

When a mother sued a school board and the state after a teacher molested her son, an appellate court affirmed that the state had absolute immunity on matters relating to teacher certification. On further review, the Supreme Court of Arizona reversed and vacated in explaining that since the immunity statute should have been narrowly construed, it extended to the licensing of a profession as a whole and not to a particular individual.[59]

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[55] Hinkley v. Baker, 122 F. Supp.2d 48 [149 Educ. L. Rep. 407] (D. Me. 2000).

[56] Hinkley v. Baker, 122 F. Supp.2d 57 [149 Educ. L. Rep. 416] (D. Me. 2000).

[57] Norris v. Norwalk Pub. Schs., 124 F. Supp.2d 791 [150 Educ. L. Rep. 176] (D. Conn. 2000).

[58] DiSalvio v. Lower Merion High Sch. Dist., 158 F. Supp.2d 553 [156 Educ. L. Rep. 899] (E.D. Pa. 2001).

[59] Doe *ex rel.* Doe v. State, 24 P.3d 1269 [155 Educ. L. Rep. 1424] (Ariz. 2001).

Sexual Abuse and Harassment by Other Parties

Where a foreign exchange student sued the sponsor organization for negligence, the federal trial court in Wisconsin granted her damages over improper sexual contact with the father in her host family while denying the organization's motions for judgment as a matter of law or for a new trial. The Seventh Circuit affirmed that a jury could consider federal regulations and rules of a private association of sponsors in determining the sponsor's duty of care.[60] According to the court, whether the sponsor's negligence caused the student harm was a question for the jury, the doctrine of superceding cause did not apply to preclude its liability, and the harm was not too remote from the sponsor's failure to exercise due care to support liability.

In Illinois, a student intern in a work-study program challenged the dismissal of her negligent supervision claim against the company. An appellate court reversed in favor of the student since company officials were aware that an employee touched her inappropriately but made no attempts to correct his conduct.[61] The court ascertained that officials even scheduled the student to work alone with the offending employee. The court was of the view that since the company had a special relationship with the student, it breached its duty of protection because officials assumed the duty to protect the intern while she was at work.

Privacy

In Oklahoma, a mother claimed that school officials violated the privacy rights of her children under the Fourteenth Amendment and the Family Educational Rights and Privacy Act (FERPA) by permitting teachers to allow students to grade each others' papers and call out the marks in class. After a federal trial court granted the board's motion for summary judgment,[62] the Tenth Circuit reversed in holding that while the students had no legitimate expectation of privacy in their schoolwork and test grades, the FERPA violation was actionable under section 1983.[63] Subsequently, in *Falvo v. Owasso Independent School District*,[64] a unanimous Supreme Court reversed in favor of the board. The Court found that since a student assignment peer-graded by another child does not satisfy FERPA's definition of an education record, the board did not violate FERPA in permitting such peer grading or calling out of scores.

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[60] Beul v. Ass'n Int'l, 233 F.3d 441 [149 Educ. L. Rep. 122] (7th Cir. 2000).

[61] Platson v. NSM Am., Inc., 748 N.E.2d 1278 [154 Educ. L. Rep. 625] (Ill. App. Ct. 2001).

[62] Falvo v. Owasso Indep. Sch. Dist. N. I-011, 146 F. Supp.2d 1137 [155 Educ. L. Rep. 272] (N.D. Okla. 1999).

[63] Falvo v. Owasso Indep. Sch. Dist. N. I-011, 233 F.3d 1203 [149 Educ. L. Rep. 664] (10th Cir. 2000).

[64] 22 S. Ct. 934 [161 Educ. Law Rep. 33] (2002).

A state department of health and human services challenged the denial of its attempt to compel school officials to disclose medical records and interviews with students and staff in connection with an investigation of abuse and neglect. The Supreme Court of Appeals of West Virginia affirmed that the department did not have a statutory right to review the records absent a showing of probable cause that the children were abused and neglected.[65]

In the first of three cases involving newspapers, a school board sought further review of a judgment that information relating to a statistical compilation of disciplinary actions was subject to disclosure pursuant to the state's Open Records Act. The Supreme Court of Kentucky affirmed that since the information did not identify individual students, it did not qualify as an educational record and was neither protected by FERPA nor exempt from disclosure under state law.[66]

A newspaper disputed the denial of its request for a redacted copy of an administrative judge's sealed order relating to alleged sexual abuse of a student by a teacher. On further review, an appellate court in New Jersey reversed and remanded.[67] The court suggested that the attorney general make recommendations for providing an appropriate redacted copy providing information so the newspaper can carry out its public charge.

In Arizona, an appellate court affirmed the denial of a request for access to student test scores prior to their official release date. Insofar as the scores were due to be released, by law, on July 1, which was a Saturday, the court was content that since Monday, July 3, was the next business day, the newspaper was not entitled to the information since the later release date met the requirements of the statute.[68]

The Commonwealth questioned an order permitting a high school student to suppress the use of samples of his handwriting when he was charged with violating a teacher's civil rights and malicious destruction of property in light of racial slurs that he wrote on a blackboard in her classroom. The Supreme Judicial Court of Massachusetts reversed and remanded in stating that the student had no expectation of privacy in his handwriting and that his homework assignments and tests were not protected school records.[69]

In New York, a mother who was charged with neglect and lost custody of her son sued various officials for violating FERPA and also alleged that they failed to follow due process in removing the child from her custody. In response to the defendants' motion for summary judgment, a federal trial court decided that the charge that the county attorney threatened the child was time barred under the state's statute of limitations, that the attorney did not violate the mother's due process rights by reporting the existence of her legal defense fund to the department of social services, and that the mother could not assert a FERPA claim against officials who requested student records.[70]

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[65] West Virginia DHHR v. Clark, 543 S.E.2d 659 [152 Educ. L. Rep. 330] (W. Va. 2000).

[66] Hardin County Schs. v. Foster, 40 S.W.3d 865 [152 Educ. L. Rep. 836] (Ky. 2001).

[67] Division of Youth and Family Servs. v. M.S., 773 A.2d 1191 [155 Educ. L. Rep. 573] (N.J. Super. Ct. App. Div. 2001).

[68] Phoenix Newspapers v. Molera, 27 P.3d 814 [155 Educ. L. Rep. 1431] (Ariz. Ct. App. 2001).

[69] Commonwealth v. Buccella, 751 N.E.2d 373 [155 Educ. L. Rep. 799] (Mass. 2001), *cert. denied*, Buccella v. Massachusetts, 122 S.Ct. 810 (2002).

An appellate court in Texas affirmed that a television station that broadcast portions of a videotape made by a high school band director to discover who was going through students' belongings, but which showed female students changing their clothes, did not subject it to liability for invasion of privacy, defamation, and intentional infliction of emotional distress.[71] The court agreed that the complaint was not actionable because the broadcasts, which were on a matter of legitimate public concern, neither defamed the students nor invaded their individual rights to privacy.

Search and Seizure

Students in Oklahoma challenged the constitutionality of a school policy that required them to agree to suspicionless drug testing prior to participating in extracurricular activities. On cross-motions, a federal trial court granted the board's motion for summary judgment on the basis that the policy was reasonable and did not violate students' Fourth Amendment rights.[72] On further review, the Tenth Circuit reversed in favor of the students.[73] The court reasoned that balancing the government's interest in conducting a particular search against an individual's privacy interests tilts, in this instance, in the students' favor. The court was particularly persuaded by the fact that school officials were unable to provide evidence of epidemic illegal drug use among students in general or that there was an identifiable drug-abuse problem among a sufficient number of participants in nonathletic extracurricular activities. Insofar as the Supreme Court has agreed to hear an appeal, it remains to be seen whether a school board can employ these measures in a concerted effort to deter student drug use among those who voluntarily engage in interscholastic competition.[74]

Similarly, Pennsylvania students and their parents sought further review of the dismissal of their challenge to a board policy that sought to implement drug and alcohol testing as a condition for participating in extracurricular activities as well as obtaining driving and parking privileges. An appellate court reasoned that while the policy violated the students' privacy rights, it did not infringe on any parental rights.[75]

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[70] Storck v. Suffolk County Dep't of Soc. Servs., 122 F. Supp.2d 392 [149 Educ. L. Rep. 440] (E.D.N.Y. 2000).

[71] Doe v. Mobile Video Tapes, 43 S.W.3d 40 [153 Educ. L. Rep. 806] (Tex. Ct. App. 2001).

[72] Earls v. Bd. of Educ., Tecumseh Pub. Sch., 115 F. Supp.2d 1281 [148 Educ. L. Rep. 152] (W.D. Okla. 2000).

[73] Earls v. Bd. of Educ., Tecumseh Pub. Sch., 242 F.3d 1264 [151 Educ. L. Rep. 752] (10th Cir. 2001).

[74] Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, *cert. granted*, 122 S. Ct. 509 [158 Educ. L. Rep. 544] (2001).

In a case from Georgia, elementary school students were strip searched by a teacher and police officer when twenty-six dollars was reported missing in a classroom. The students sued the board and various officials. On further review of a grant of summary judgment in favor of the defendants, the Eleventh Circuit affirmed that strip searches without individualized suspicion were unreasonable and unconstitutional.[76] Even so, the court contended that school officials were entitled to qualified immunity and that the board was not liable due to inadequate training and supervision.

Similarly, a federal trial court in Illinois denied a police officer's motion for reconsideration of a grant of summary judgment in favor of elementary school students who sued him for an illegal search for missing money.[77] The search of thirty students in a gym class included the police officer's asking the students to lower their pants. The court asserted that since the search was unreasonable, the officer was not entitled to qualified immunity.

Where school employees strip searched two students in a futile attempt to locate another student's ring, the students challenged the denial of their claims other than those for compensatory damages. The Supreme Court of New Mexico reinstated all of the earlier judgments except attorney fees, which were remanded.[78] The court noted that the strip-to-undergarments search violated both clearly established law and rights to be free from searches that are unjustified at inception and excessive in scope.

In a second case from New Mexico, a juvenile successfully challenged his six-month sentence for possession of marijuana. An appellate court concluded that an assistant principal was not within his statutory authority to enforce school rules when he seized three students he suspected of smoking at an off-campus location before the start of classes.[79] The court observed that, since the assistant principal's ordering the students into his car to take them to school was a seizure that violated the Fourth Amendment, this tainted his search of their bags and pockets.

Where a security officer in a school parking lot searched the car of a high school student in Indiana, the student relied on the Fourth and Fourteenth Amendments in disputing both the search and an implied consent provision in the board's behavior code. Following review by a federal magistrate, a federal trial court concluded that the search was constitutional because it was supported by the security officer's belief that the student, who had gone to his car without a pass during lunch hour, may have been smoking in his vehicle.[80] The court rejected the student's challenge to the implied consent policy since it had not been relied on to justify the search.

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[75] Theodore v. Del. Valley Sch. Dist., 761 A.2d 652 [148 Educ. L. Rep. 985] (Pa. Commw. 2000).

[76] Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 [156 Educ. L. Rep. 508] (11th Cir. 2001).

[77] Bell v. Marseilles Elementary Sch., 160 F. Supp.2d 883 [156 Educ. L. Rep. 1066] (N.D. Ill. 2001).

[78] Kennedy v. Dexter Consol. Schs., 10 P.3d 115 [148 Educ. L. Rep. 1047] (N.M. 2000).

[79] State v. Crystal B., 24 P.3d 771 [154 Educ. L. Rep. 978] (N.M. App. 2000).

In Texas, a sixth-grade student and his father successfully questioned a school board's mandatory drug-testing policy for all pupils in grades six to twelve.[81] A federal trial court ruled that the policy violated the Fourth Amendment because the board failed to demonstrate a sufficient special need for suspicionless testing of all students.

A student sought further review of being adjudicated a juvenile offender and committed to a correctional facility for three separate cases involving drug offenses. The Supreme Court of Kansas affirmed that a tip from a student to school administrators was an appropriate basis for reasonable suspicion that justified the search.[82] The court indicated that school administrators were not required to get a warrant for the search or inform the student of his Miranda rights, that a security officer was justified in frisking him, and that marijuana seized from his pocket was admissible evidence.

Where a school attendance officer suspected a student of violating a closed-campus rule, his directing the pupil to empty his pockets led to the discovery that the student was carrying marijuana. After the denial of the student's motion to suppress the evidence, he was convicted of drug possession. On further review, an appellate court in Washington reversed in favor of the student in deciding that the officer's suspicion that he violated the closed-campus rule did not provide reasonable grounds for the search.[83]

A defendant who was indicted on weapons possession charges when a loaded handgun was discovered in his pocket during a high school search moved to suppress the evidence. A trial court in New York posited that since the school safety officer acted appropriately in asking the defendant to come to the dean's office when he was unable to produce identification, the search was reasonable and his statements to the dean were admissible.[84] Even so, the court refused to admit the defendant's statements to a police officer because they were made after he was taken into custody.

In North Carolina, a juvenile questioned her being adjudicated delinquent after a principal searched her and discovered that she was carrying a knife on school property. An appellate court affirmed that since the reasonableness standard governed the search, the principal's having approached the student in the school parking lot after the final bell had rung and searching her was appropriate. Even in affirming, the court remanded to correct a minor error in the adjudication order.[85]

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[80] Anders *ex rel.* Anders v. Fort Wayne Cmty. Schs., 124 F. Supp.2d 618 [150 Educ. L. Rep. 155] (N.D. Ind. 2000).

[81] Tannahill *ex rel.* Tannahill v. Lockney Indep. Sch., 133 F. Supp.2d 919 [152 Educ. L. Rep. 549] (N.D. Tex. 2001).

[82] *In re* L.A., 21 P.3d 952 [152 Educ. L. Rep. 804] (Kan. 2001).

[83] State v. B.A.S., 13 P.3d 244 [149 Educ. L. Rep. 256] (Wash. Ct. App. 2000).

[84] People v. Butler, 725 N.Y.S.2d 534 [154 Educ. L. Rep. 271] (N.Y. Sup. Ct. 2001).

[85] *In re* D.D., 554 S.E.2d 346 [158 Educ. L. Rep. 855] (N.C. Ct. App. 2001).

Instructional Issues

School-aged residents of Pennsylvania unsuccessfully challenged a state statute that limits the education available to youths who are convicted as adults and incarcerated in adult, county correctional facilities, but not in state facilities. The Third Circuit affirmed that heightened equal protection did not apply and that since the statute had a rational basis, the plaintiffs had not shown reasonable probability that it would be overturned based on equal protection.[86]

In a second case from Pennsylvania, students and parents filed suit claiming that a school board violated both their First Amendment rights to petition the government for grievances and their recognized property interest in an education by closing eight schools. The suit alleged that while the board discussed the issue during its regular budget meeting, it had not specifically announced the topic of closing schools and that state law required it to wait three months after its discussion before acting. A federal trial court was of the opinion that the students did not have a property interest in attending a specific school and, consequently, the closings did not violate First Amendment rights.[87]

Parents of an elementary school student sought further review of a grant of summary judgment in favor of a school board in their suit alleging violations of equal protection based on their daughter's class assignment and seating. The Seventh Circuit affirmed in part in declaring that the parents did not establish a claim that their daughter's classroom assignment was based on race.[88] The court reflected that even though race was considered in balancing classrooms, the primary reasons for the assignment were that the parents requested a teacher with high expectations for students and the child had problems with certain peers who were assigned to other classrooms. The court reversed and remanded on the issue of race-based seating in discerning that the teacher considered race when pairing students in group assignments. Further, while the court added that the teacher did not have qualified immunity and the facts precluded summary judgment with regard to the race-based seating procedure, the board was not liable for the teacher's seating assignment since it was not based on an established policy or custom.

A federal trial court issued a declaratory judgment against the state of Arizona for failing to provide limited English proficient children with an appropriate program of instruction.[89] In so doing, the court ordered state officials to prepare a cost study in a timely manner so that the legislature could appropriate funding during the next budget session.

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[86] Brian B. *ex rel.* Lois B. v. Commonwealth of Pa. Dep't of Educ., 230 F.3d 582 [148 Educ. L. Rep. 98] (3rd Cir. 2000), *cert. denied sub nom.*, Brian B. v. Hickok, 532 U.S. 972 (2001).

[87] Mullen v. Thompson, 155 F. Supp.2d 448 [156 Educ. L. Rep. 526] (W.D. Pa. 2001).

[88] Billings v. Madison Metro. Sch. Dist., 259 F.3d 807 [156 Educ. L. Rep. 44] (7th Cir. 2001).

[89] Flores v. Arizona, 160 F. Supp.2d 1043 [156 Educ. L. Rep. 1081] (D. Ariz. 2000).

In Louisiana, a mother unsuccessfully filed a class action suit against a school board for willful neglect and breach of duty in light of its allowing eighth-grade students to be taught algebra by individuals who were not certified for secondary education, thereby depriving the students of receiving high school credit. An appellate court affirmed a grant of summary judgment in favor of the board in pointing out that the mother failed to establish that individual members acted with willful misconduct.[90]

Miscellaneous

In the first of two cases from Ohio, where a student died as a result of breaking his neck when hitting his head on a wall during a basketball tryout, the administrator of his estate sued the school board and various officials. A federal trial court, in only addressing the section 1983 claim that the student's death violated his constitutionally protected interest in personal bodily integrity, dismissed in favor of the defendants.[91] According to the court, school officials did not have a Fourteenth Amendment duty to provide for the student's safety during the tryout.

When a minority student was assaulted by a nonminority at school, his mother sued the board and superintendent in his official capacity for violating the child's right to equal protection. A federal trial in Ohio court granted the defendants' motion to dismiss in acknowledging that since no special relationship existed between the student and the board, its alleged failure to protect did not give rise to a due process or equal protection claim.[92]

A school board in Illinois sought to strike claims for punitive damages from a student's title IX claim for discrimination and retaliation on the basis of sex. A federal trial court agreed that since punitive damages against a municipality were not allowed under title IX, the more effective means of stopping misconduct would have been assessing punitive damages against the offending official.[93]

In a second action involving title IX, a mother claimed that her school-aged daughter suffered from sexual discrimination. A federal trial court in New York maintained that while the mother did not have standing, she could amend the charges to allow her daughter to file her own claims.[94]

A federal trial court in Arkansas granted a time extension to African American parents, who alleged that their children were subjected to a racially hostile environment, to respond to a motion to dismiss all claims.[95]

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[90] Tollett v. Orleans Parish Sch. Bd., 782 So. 2d 681 [153 Educ. L. Rep. 463] (La. Ct. App. 2001).

[91] Pope v. Trotwood-Madison City Sch. Dist. Bd., 162 F. Supp.2d 803 [157 Educ. L. Rep. 602] (S.D. Ohio 2000).

[92] Oldham *ex rel.* Young v. Cincinnati Pub. Schs., 118 F. Supp.2d 867 [148 Educ. L. Rep. 845] (S.D. Ohio 2000).

[93] Landon v. Oswego Unit Sch. Dist. No. 308, 143 F. Supp.2d 1011 [155 Educ. L. Rep. 194] (N.D. Ill. 2001).

[94] Morgan v. City of N.Y., 166 F. Supp.2d 817 [158 Educ. L. Rep. 239] (S.D.N.Y. 2001).

[95] Steel v. Alma Pub. Sch. Dist., 162 F. Supp.2d 1083 [157 Educ. L. Rep. 613] (W.D. Ark 2001).

The court did dismiss claims that were not appropriate, including an individual capacity suit under title VI and a section 1983 action against the state department of education. At the same time, the court permitted official capacity suits under title VI, section 1983, and state civil rights laws to proceed against a director, superintendent, and school board.

Where an African American received the majority of student votes for student council president but the faculty selected another candidate, school officials agreed to conduct another election so long as each candidate collected eleven faculty signatures. When the student with the most votes could not get the required faculty support and was declared ineligible for the election, he and his parents sued for breach of contract. A federal trial court in Mississippi was satisfied that since the student and his parents presented claims under state law, the dispute should be heard.[96]

A father with disputed custodial rights challenged the denial of his claim of intentional interference when his son was released by the principal to the child's mother, who was accompanied by a police officer. The Supreme Court of Alaska agreed that since the principal's actions were discretionary, he and the school board were entitled to qualified immunity.[97]

In Florida, a teacher unsuccessfully sued high school students for intentional infliction of emotional distress for participating in the production and distribution of a newsletter containing a threat to kill her and rape her and her children. On further review, an appellate court reversed and remanded in holding that the teacher did state a cause of action for intentional infliction of emotional distress.[98]

A school board sought further review of a commissioner of administration's order directing it to rescind and destroy a letter from school employees that expressed concern over a child's care in a foster home. An appellate court in Minnesota affirmed that the letter was not a confidential mandated report of child neglect or abuse but was government data over which the commissioner had jurisdiction.[99]

Sanctions for Student Misconduct

Generally

A student in Ohio sued a school board and others for allegedly depriving him of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights when police officers handcuffed him as a result of his disruptive behavior. More specifically, the student claimed that the defendants engaged in infliction of emotional distress, assault and battery, and intentional restraint of freedom. Insofar as an amended version of the student's complaint was still in a federal trial court, the Sixth Circuit only addressed the Fourth Amendment claim.[100] The court was convinced that absent an allegation of physical injury, the police officers were entitled to qualified immunity since the student's being handcuffed incident to a lawful arrest did not involve the excessive use of force.

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[96] Owens v. Catholic Diocese of Jackson, Miss., 169 F. Supp.2d 588 [158 Educ. L. Rep. 624] (S.D. Miss. 2001).

[97] Pauley v. Anchorage Sch. Dist., 31 P.3d 1284 [157 Educ. L. Rep. 363] (Alaska 2001).

[98] Nims v. Harrison, 768 So. 2d 1198 [148 Educ. L. Rep. 518] (Fla. Dist. Ct. App. 2000).

[99] Determination of Resp. Auth. for S. Wash. County Sch. Dist. 833, 620 N.W.2d 45 [149 Educ. L. Rep. 604] (Minn. Ct. App. 2000).

When a band teacher in Arkansas called a student "retarded" and "dumb" in front of her classmates and struck her in the face with a notebook, the student unsuccessfully filed suit, alleging that the teacher violated her right to substantive due process and subjected her to intentional infliction of emotional distress. The Eighth Circuit affirmed a grant of summary judgment in favor of the school board and teacher since the complained-of behavior was not shocking to the conscience and did not support claims for violating substantive due process or intentional infliction of emotional distress.[101]

Where a student was excluded from school and placed in an alternative education program for seventy days without a formal hearing, he sued the school board for denying him the right to due process and an appropriate education as well as for various violations of state laws. A federal trial court in Pennsylvania dismissed in favor of the board in ascertaining that the student did not have an independent cause of action for monetary damages for violating state education regulations.[102]

In a second Pennsylvania case, a mother sued a school board and teacher for allegedly violating her daughter's right to substantive due process by repeatedly yelling at her in a mathematics class. Even though administrators documented many occasions when the teacher yelled at and badgered students and made it clear that such conduct would no longer be tolerated, an investigation revealed that the teacher had not yelled at the girl in this particular instance, but instead had given her a two-day suspension for cursing in class. The girl was then transferred to another class at her mother's request. A federal trial court was of the view that the teacher's reprimanding the girl for cursing and repeatedly questioning her about a mathematics problem did not shock the conscience or violate the Fourteenth Amendment.[103] The court remarked that the board could not be liable since the alleged abuse did not infringe on a constitutionally protected interest.

Where two students were forced to stand naked for sixteen minutes in a gym shower after ripping each other's swimsuits during swimming class, one student and his parents sued the school board, administrators, and physical education teacher. A federal trial court in Illinois dismissed the Fourteenth Amendment substantive due process claim since it was addressed under the Fourth Amendment charge.[104] The court dismissed a FERPA claim since the law was adopted to cover systematic violations of privacy and not individual allegations. At the same time, the court permitted the student's Fourth Amendment claim, alleging that he was subjected to an unreasonable seizure, to proceed.

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[100] Neague v. Cynkar, 258 F.3d 504 [155 Educ. L. Rep. 1059] (6th Cir. 2001).

[101] Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 [157 Educ. L. Rep. 520] (8th Cir. 2001), *reh'g en banc denied, reh'g denied*, 2001 U.S. App. LEXIS 24821 (8th Cir. 2001).

[102] Whipple *ex rel.* Whipple v. Warren County Sch., 133 F. Supp.2d 381 [152 Educ. L. Rep. 129] (W.D. Pa. 2000).

[103] S.M. v. Lakeland Sch. Dist., 148 F. Supp.2d 542 [155 Educ. L. Rep. 335] (M.D. Pa. 2001).

The Supreme Court of California affirmed that a student who carried a knife with a locking blade to school was a ward of the court who should be placed on probation.[105] The court agreed that school officials may detain and question a student in the absence of reasonable suspicion of criminal activity or violation of school rules as long as they do not exercise their authority arbitrarily or capriciously.

A juvenile challenged his being adjudicated delinquent and placed on probation for acts which would have constituted battery of a police officer and resisting arrest if committed by an adult. An appellate court in California affirmed that since the police officer was acting lawfully in the performance of his duties, his use of force was justified by the juvenile's hostile and belligerent behavior, and he did not have to articulate the specific statute that he reasonably appeared to have violated.[106]

In a third California case, a student who carried a razor blade in his billfold while at school sought further review of his being placed on probation for violating the state penal code. An appellate court ruled that the student could challenge the probation order and that the razor blade alone did not violate the provision prohibiting possession of weapons on school grounds.[107] The court reversed the probation order but encouraged the legislature to address the concern that the razor blade could be viewed as a dangerous object posing a significant safety hazard.

Shortly after the Columbine High School shootings, rumors began to circulate that a high school in North Carolina might have been the target of a copycat crime. A police investigation disclosed that a screen saver was created by a student who, although admitting to having written the message, claimed that it was meaningless. Even so, the student sought further review of his being found guilty of the crime of communicating a threat. An appellate court reversed and vacated the conviction.[108] Among other things, the court was persuaded by the uncertainness of the screen saver message since leaping to the conclusion that merely writing "the end is near" was evidence of the student's intent to bomb the school was too speculative and not a reasonable inference. In addition, the court noted that the student was never connected with any of the alleged bomb threats directed at the school and his prior history of good behavior supported the notion that his act was a prank, not a criminal offense.

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[104] Daniel S. v. Bd. of Educ. of N.Y. Cmty. High Sch., 152 F. Supp.2d 949 [156 Educ. L. Rep. 135] (N.D. Ill. 2001).

[105] *In re* Randy G., 110 Cal.Rptr.2d 516 [155 Educ. L. Rep. 1292] (Cal. 2001).

[106] *In re* Joseph F., 102 Cal. Rptr.2d 641 [149 Educ. L. Rep. 835] (Cal. Ct. App. 2000).

[107] *In re* Do Kyung K., 106 Cal. Rptr.2d 31 [152 Educ. L. Rep. 725] (Cal. Ct. App. 2001).

[108] State v. Mortimer, 542 S.E.2d 330 [151 Educ. L. Rep. 693] (N.C. App. 2001).

Similarly, when school officials discovered a threatening letter in a school computer room three days after the Columbine High School killings, fourteen students were confronted, frisked, handcuffed, and detained by police officers. While no students were charged in the incident, they sued various officials, alleging deprivations of their Fourth and Fourteenth Amendment rights. A federal trial court in Texas, although describing the incident as unfortunate, dismissed the claims against the defendants on the basis that they had not engaged in unreasonable searches and seizures given the magnitude of the threat presented in the letter and the fear that the students might have been congregating in the same area as the suspected letter writer.[109]

When a student was chained to a tree by a teacher who supposedly wanted to keep him from leaving class early, he sought further review of a directed verdict in favor of the teacher in response to the student's suit for false imprisonment, assault and battery, and outrage. An appellate court in Kentucky reversed in favor of the student after observing that there was sufficient proof of emotional damages to justify submitting the issue to a jury.[110]

A student challenged her being adjudicated delinquent for threatening another pupil who reported a hate list containing the names of numerous peers, an act that, if committed by an adult, would have constituted the crime of intimidation. An appellate court in Indiana affirmed on the basis that the statements were true threats, not idle communication, and evidence supported that they were made in retaliation.[111]

In a second case from Indiana, a middle school student returned to class after a five-day suspension and verbally abused teachers. A police officer arrested the student after telling her to leave school or he would arrest her for criminal trespass and disorderly conduct. On further review of her being adjudicated guilty of trespass, an appellate court affirmed that her disorderly conduct breached any right she had to remain on school property.[112] However, the panel reversed in deciding that a trial court could neither issue a parental participation order without an appropriate petition nor impose fees without first conducting an indigency hearing.

A student who made a false fire alarm report at a junior high school challenged his juvenile delinquency conviction. An appellate court in Texas affirmed that this was an appropriate punishment since the student knew that his report was baseless and that it would cause action by an official agency dealing with emergencies.[113]

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[109] Stockton v. City of Freeport, Tex., 147 F. Supp.2d 642 [155 Educ. L. Rep. 286] (S.D. Tex. 2001).

[110] Banks v. Fritsch, 39 S.W.3d 474 [152 Educ. L. Rep. 379] (Ky. Ct. App. 2001).

[111] H.J. v. State, 746 N.E.2d 400 [152 Educ. L. Rep. 772] (Ind. Ct. App. 2001).

[112] A.E.B. v. State, 756 N.E.2d 536 [157 Educ. L. Rep. 848] (Ind. Ct. App. 2001).

[113] *In re* C.R.K., 56 S.W.3d 288 [158 Educ. L. Rep. 475] (Tex. Ct. App. 2001).

In New York, a student who was charged with fifty-six criminal counts, thirty-four of which were for criminal use of a firearm in the first degree for bringing a pistol, a shotgun, and seventeen explosive devices to his high school, entered a motion to dismiss most of the charges as multiplicitous. A trial court denied the claim in ruling that since each explosive device had a separate identity, it could support a count of possession of a deadly weapon.[114]

Corporal Punishment

A student in Texas was injured as a result of exercise imposed as a form of corporal punishment in a physical education class. The student's parents sued a teacher and school board for violating their due process rights and then challenged a grant of summary judgment in favor of the defendants. The Fifth Circuit affirmed that the punishment was not a due process violation since state law provided adequate remedies.[115] Further, the court declined to exercise jurisdiction over the state law claims, which it dismissed without prejudice.

A member of a varsity football team in Georgia unsuccessfully sued his coach, principal, superintendent, and school board, claiming that the coach violated his due process right to be free from excessive corporal punishment. On further review, the Eleventh Circuit vacated and remanded, explaining that the coach's striking the student with a metal weight which resulted in the loss of an eye was corporal punishment that was so excessive and predictably injurious that it supported a claim for violating his right to substantive due process.[116]

A middle school student with no apparent history of disciplinary problems was subjected to corporal punishment by a substitute physical education teacher in violation of a board policy which permitted it only as a last resort. In a suit against the board alleging negligence, assault and battery, and intentional infliction of emotional distress, a trial court granted the board's, but not the teacher's, motion for summary judgment. Subsequently, the court entered a judgment against the teacher for $5,000 plus deposition costs. On further review, an appellate court in Alabama affirmed the judgment against the teacher in her individual capacity while rejecting her defense of discretionary function immunity where there was sufficient evidence that her complete disregard for the corporal punishment policy gave rise to legal malice.[117]

In Arkansas, a student who was sent to the principal's office because he disrupted class several times objected when he was told that he would, and in fact did, receive a paddling. The principal allowed the student to call his parents but, when he was unable to reach them, he was paddled and sent to the health room to calm down. The parents sued the principal for allegedly violating their son's substantive due process rights as well as for infliction of emotional distress and false imprisonment. A federal trial court granted the principal's motion for summary judgment as it was believed that he did not violate the student's rights to due process.[118]

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[114] People v. Getman, 729 N.Y.S.2d 858 [156 Educ. L. Rep. 669] (N.Y. App. Div. 2001).

[115] Moore v. Willis Indep. Sch. Dist., 233 F.3d 871[149 Educ. L. Rep. 337] (5th Cir. 2000), *reh'g en banc denied*, 248 F.3d 1145 (5th Cir. 2001).

[116] Neal v. Fulton County Bd. of Educ., 229 F.3d 1069 [148 Educ. L. Rep. 86] (11th Cir. 2000), *reh'g en banc denied*, 244 F.3d 143 (11th Cir. 2000).

[117] Hinson v. Holt, 776 So. 2d 804 [151 Educ. L. Rep. 343] (Ala. Civ. App. 1998).

Suspension and Expulsion

Pursuant to a zero tolerance policy, a student in Tennessee was expelled when a knife belonging to someone else was discovered in his vehicle. The student sought monetary damages and the school board and officials challenged the denial of their motions for summary judgment. The Sixth Circuit affirmed that suspending or expelling a student for weapons possession under a zero tolerance policy, even if he did not knowingly possess any weapon, was not rationally related to any legitimate state interest that would survive a due process challenge.[119] The court affirmed the denial of the board's motion for summary judgment since there were unresolved material issues of fact about its awareness of the student's knowledge of the weapon. However, the court did reverse in favor of the superintendent in determining that he was entitled to qualified immunity.

The Sixth Circuit reversed and remanded a Kentucky case involving students who were suspended for wearing T-shirts depicting a Confederate flag.[120] The students wore T-shirts like the one that a country music singer wore at a concert to commemorate the birthday of his father and to express southern heritage. In reversing a grant of summary judgment in favor of the board, the court was of the opinion that the students engaged in protected speech. The court judged that material issues of fact as to whether the school board selectively applied the dress code to racially sensitive symbols but not to others and whether it had a history of racial violence requiring such a ban precluded its motion for summary judgment.

High school students from Illinois, who were expelled for participating in a gang-related fight in the bleachers during a football game, sought further review of the rejection of their section 1983 claim over the constitutionality of a school rule on which their expulsions were based. The Seventh Circuit affirmed that a student who was permitted to withdraw from school prior to disciplinary hearings lacked standing, but that the remaining plaintiffs had standing even though their expulsions ended and the rule had since been changed.[121] The court agreed that the rule prohibiting students from engaging in "gang-like activity" was not impermissibly vague on its face or as applied.

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[118] Fox v. Cleveland, 169 F. Supp.2d 977 [158 Educ. L. Rep. 638] (W.D. Ark. 2001).

[119] Seal v. Morgan, 229 F.3d 567 [148 Educ. L. Rep. 34] (6th Cir. 2000).

[120] Castorina v. Madison County Sch. Bd., 246 F.3d 536 [152 Educ. L. Rep. 524] (6th Cir. 2001).

[121] Fuller *ex rel.* Fuller v. Decatur Pub. Sch. Bd., 251 F.3d 662 [154 Educ. L. Rep. 127] (7th Cir. 2001).

When a student in Washington was expelled for showing a teacher a poem he wrote depicting the violent death and shooting of peers, school officials placed the documentation in his permanent file. The student's father obtained an order enjoining officials from keeping the documentation in his son's file. On further review, the Ninth Circuit affirmed in part, stating that the school did not need to maintain the negative documentation once the perceived threat had subsided.[122] At the same time, the court reversed in favor of the board in offering that officials did not violate the student's First Amendment rights by expelling him on an emergency basis since they had the duty to prevent potential violence on the campus.

A ninth grader in a military academy in New Mexico who admitted assaulting his roommate unsuccessfully sued school officials, alleging that he was deprived of due process in disciplinary proceedings that preceded his expulsion. On appeal, the Tenth Circuit affirmed that the student's right to due process was not offended by minor irregularities in the written notice of the disciplinary charges that he received.[123] The court acknowledged that equal protection was not offended by the fact that military academies subscribe to a lesser degree of disciplinary safeguards than nonmilitary civilian schools.

In a Pennsylvania case, a high school student and his mother alleged that school officials violated his First Amendment and due process rights by suspending him for composing a list that ridiculed a school's athletic director. A federal trial court acknowledged that the board violated the student's due process rights when it failed to provide written notification and reasons for his suspension.[124] The court found that the student's document did not disrupt the school's activities or interfere with anyone's substantial rights while the policy against abuse of teachers and administrators was unconstitutionally vague and overbroad.

A high school student who was expelled sued a school board and various officials in connection with the search of his truck, which led to the discovery of a machete. A federal trial court in Texas granted the defendants' motions for summary judgment in positing that the search was permissible and the seizure of the machete was valid.[125] The court maintained that the student was not denied procedural due process in connection with his expulsion and that school officials did not violate his right to substantive due process.

In the first of three more cases from Pennsylvania, when a high school student was expelled for making terroristic threats, his father sued school officials, alleging that they violated his rights. A federal trial court in Pennsylvania granted the board's motion to dismiss in decreeing that the ten-day suspension did not violate the student's procedural due process rights and that since officials had a rational reason for expulsion, he could not prevail on a claim that his substantive due process rights were violated.[126] The court added that officials did not violate the student's Fifth Amendment right against self-incrimination when he was not given his Miranda rights before being questioned about a note claiming that there was a bomb in school.

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[122] LaVine v. Blaine Sch. Dist., 257 F.3d 981[155 Educ. L. Rep. 1019] (9th Cir. 2001).

[123] Watson *ex rel.* Watson v. Beckel, 242 F.3d 1237 [151 Educ. L. Rep. 743] (10th Cir. 2001).

[124] Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp.2d 446 [153 Educ. L. Rep. 90] (W.D. Pa. 2001).

[125] Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp.2d 735 [154 Educ. L. Rep. 183] (S.D. Tex. 2001).

A student who participated in a home-tutoring program after she was suspended for a variety of offenses sued school officials who denied her a diploma even though she completed all of the course work and examination requirements for graduation. An appellate court in Pennsylvania affirmed that since the student satisfactorily completed all prescribed requirements for graduation, school officials had no choice but to award her a high school diploma.[127]

Where a student was suspended for using a pocketknife to gain access to a vending machine, his attorney's ability to procure a preliminary injunction prevented school officials from implementing the penalty. In addition, the attorney's delaying tactic of failing to respond in a timely manner meant that since the student attended graduation, he could attempt to quash the board's appeal as moot. An appellate court in Pennsylvania rejected the student's argument in pointing out that such an incident could occur again and that its acceptance of the dispute would have been appropriate even if the case were moot.[128] The panel decreed that since school officials issued a five-day suspension and state law did not provide recourse for an exclusion of less than ten days, the trial court lacked jurisdiction to entertain the student's request for the injunction in the first place.

A high school student was expelled for plotting to bring guns to school in order to shoot selected administrators. The student's mother sued the school board and officials, claiming that they violated her son's right to due process. A federal trial court in Wisconsin dismissed in favor of the defendants in contending that the student received appropriate due process at his expulsion proceeding.[129] The court indicated that since school officials had evidence of a conspiracy to shoot administrators, they had a rational basis for the expulsion that precluded the student's alleging that his right to substantive due process was violated.

Where a student inadvertently injured an assistant principal who attempted to break up a fight that she was in, she unsuccessfully challenged the rule under which she was expelled for the remainder of the semester. The Supreme Court of Nebraska affirmed that school officials did not exceed their authority, that the rule was sufficiently clear and definite, and that an accidental exception allowed in the rule did not preclude punishing the student under another subsection.[130]

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[126] Brian A. *ex rel.* Arthur A. v. Stroudsburg Area Sch., 141 F. Supp.2d 502 [154 Educ. L. Rep. 504] (E.D. Pa. 2001).

[127] Ream v. Centennial Sch. Dist., 765 A.2d 1195 [150 Educ. L. Rep. 773] (Pa. Commw. Ct. 2001).

[128] *In re* Appeal of J.A.D., 782 A.2d 1069 [158 Educ. L. Rep. 395] (Pa. Commw. Ct. 2001).

[129] Remer v. Burlington Area Sch. Dist., 149 F. Supp.2d 665 [155 Educ. L. Rep. 419] (E.D. Wis. 2001).

Where a trial court ordered a school board to reinstate students who were expelled for shooting a peer with a pellet gun during the class day, it sought further review. The Supreme Court of Idaho reversed in favor of the board in deciding that the students received all of the process they were due at the expulsion hearing.[131]

A school board sought further review of an order directing it to reinstate a student who was expelled for violence and threats he made while being escorted to the principal's office. An appellate court in Arkansas reversed in favor of the board on the ground that the evidence supported the student's being expelled for the remainder of the school year.[132]

In Oregon, a school board questioned an order directing officials to reinstate a student who was removed from his position as class president after he showed up at school in possession of marijuana. An appellate court reversed in favor of the board in judging that it acted within its authority to discipline the student even though the only penalty identified was a four-week suspension.[133]

A high school student in Florida challenged his expulsion from school for firing an automatic pellet gun at a group of children in his neighborhood. An appellate court reversed in favor of the student in reflecting that while the offense would properly have been subject to police action, it was not an appropriate matter for school discipline since it occurred in an area unrelated to school property or activities.[134]

Where a trial court in Ohio ordered the reinstatement of a high school student who was readmitted to classes even though he violated his school's dangerous weapons policy, the board sought further review. An appellate court affirmed that the student was properly readmitted since school officials violated his right to due process when the expulsion hearing before an assistant superintendent did not take place until two weeks after he was notified of the expulsion, well beyond the statutory five-day time limit.[135]

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[130] Busch *ex rel.* Knave v. Omaha Pub. Sch. Dist., 623 N.W.2d 672 [152 Educ. L. Rep. 278] (Neb. 2001).

[131] Rogers v. Gooding Pub. Joint Sch. Dist. 231, 20 P.3d 16 [152 Educ. L. Rep. 303] (Idaho 2001).

[132] Wynne Pub. Schs. v. Lockhart, 32 S.W.3d 47 [149 Educ. L. Rep. 628] (Ark. Ct. App. 2000).

[133] Ferguson v. Phoenix-Talent Sch. Dist. No. 4, 19 P.3d 943 [152 Educ. L. Rep. 297] (Or. Ct. App. 2001).

[134] M.T. v. Sch. Bd. of Manatee County, 779 So. 2d 328 [152 Educ. L. Rep. 434] (Fla. Dist. Ct. App. 1999).

[135] Kresser v. Sandusky Bd. of Educ., 748 N.E.2d 620 [154 Educ. L. Rep. 293] (Ohio Ct. App. 2001).

Parents sought further review of an order approving a school board's expulsion of their children and placing them in an alternative school. An appellate court in Louisiana vacated and remanded in reasoning that the procedure the board applied in expelling the students and placing them in alternative school afforded them clear notice of their acts of misconduct and opportunity to be heard.[136] The court was convinced that although the students did not commit the charged offense of possession of a controlled dangerous substance on campus, a disciplinary violation punishable by suspension or expulsion from school nevertheless occurred. The court was of the view that even though expulsion and assignment to the alternative school remained as a possible punishment for the disruptions that the students caused when they left campus without authorization, smoked marijuana, and returned to school, remand was required to evaluate the appropriate method of discipline necessary to protect their due process rights.

A school board challenged an action of the Minnesota Department of Children, Families, and Learning which reversed a hearing officer's finding that since a student was involved in making a bomb threat he should have been expelled from school. An appellate court affirmed that since the hearing office only had hearsay evidence to support his action, he lacked an adequate basis on which to order the expulsion.[137]

Desegregation

Desegregation Plan Oversight

New York state challenged a court order allocating the expenses of compliance with its desegregation decree between it and a city's public schools. The Second Circuit ruled that the trial court did not abuse its discretion in failing to continue to give the state credit for magnet school aid that the city received from it pursuant to a statewide magnet aid program, in failing to credit the state for categorical grants under four statewide aid programs, or in shifting universal pre-kindergarten costs from an educational improvement plan.[138]

On remand in a related part of the ongoing desegregation suit from Yonkers, a federal trial court in New York discerned that vestiges of segregation remained in the district with respect to academic tracking, disciplinary practices, administration of special education programs, pupil personnel services, and services for limited English proficiency students.[139] The court referred the matter to a monitor to recommend a suitable remedy.

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[136] McCall v. Bossier Parish Sch. Bd., 785 So. 2d 57 [154 Educ. L. Rep. 995] (La. Ct. App. 2001).

[137] *In re* Expulsion of E.J.W. From Indep. Sch. Dist. No. 500, 632 N.W.2d 775 [156 Educ. L. Rep. 688] (Minn. Ct. App. 2001).

[138] Yonkers Branch - NAACP v. City of Yonkers, 251 F.3d 31 [154 Educ. L. Rep. 101] (2nd Cir. 2000).

After vacating and remanding a desegregation action in which a white student sought relief on the basis of reverse discrimination,[140] the Fourth Circuit granted an en banc rehearing.[141] In affirming that the school district in North Carolina achieved unitary status by complying with a federally supervised desegregation plan, the court returned control to the integrated school board which demonstrated its commitment to a desegregated school system. At the same time, the court reversed the injunction which required the board to refrain from the use of race-based lotteries, preferences, and set-asides in student assignments, finding the injunction unwarranted since there was nothing in the record suggesting that it would use race in an unconstitutional manner.

In Mississippi, a federal trial court approved a school board's motion to modify a desegregation plan in order to build a new high school. On further review, the Fifth Circuit affirmed that the proposed site for the new school met the board's obligation as a former de jure segregated system to further the goal of desegregation even if another site arguably might have served that goal better.[142]

On further review of a trial court's denial of a school board's motion to terminate oversight in an on-going desegregation suit from Illinois, the Seventh Circuit reversed and remanded in finding that the board eliminated the consequences of segregation.[143] The court noted that while there were no white-only or minority-only schools in the district and the education of minority children was behind that of whites, there was no evidence that this lag was greater than in other school systems. The court remarked that the plaintiffs could not produce a single instance showing that the school board violated any provision of the desegregation decree.

A school board in Florida challenged a federal trial's rejection of its motion for unitary status in a forty-year-old desegregation case. The court refused to issue such an order since the district still had racial imbalances in student assignments and failed to achieve an effective majority-to-minority transfer program. The Eleventh Circuit reversed and remanded in favor of the board in holding that the imbalances were the result of demographic factors over which the board did not have control.[144] The court ascertained that the lack of an effective transfer plan was not a sufficient ground on which to conclude that the board had not complied in good faith with the desegregation order.

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[139] United States v. Yonkers Branch-NAACP, 123 F. Supp.2d 694 [149 Educ. L. Rep. 721] (S.D.N.Y. 2000).

[140] Belk v. Charlotte-Mecklenburg Bd. of Educ., 233 F.3d 232 [149 Educ. L. Rep. 38] (4th Cir. 2000).

[141] Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 [158 Educ. L. Rep. 86] (4th Cir. 2001), *cert. denied*, 122 S. Ct. 1537 (2002).

[142] Anderson v. Canton Mun. Separate Sch. Dist., 232 F.3d 450 [149 Educ. L. Rep. 321] (5th Cir. 2000).

[143] People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073 [152 Educ. L. Rep. 543] (7th Cir. 2001).

When a school board in Pennsylvania sought a declaration of unitary status and an end to judicial oversight, the plaintiff class opposed the motion. A federal trial court partially granted the motion in asserting that the board acted in sufficiently good faith since remaining disparities in test scores and occurrences of discipline did not preclude granting its request.[145] However, the court refused to grant the entire motion in observing that the board failed to comply fully with an order to eliminate tracking.

In Michigan, a federal trial court rejected a motion filed by a school board and the state seeking unitary status and the termination of judicial oversight. According to the court, the board and state (rather than the claimants) had the burden of establishing that differences in student achievement levels between races were not vestiges of past segregative conduct.[146]

State Court Cases

Taxpayers objected to real estate taxes levied by a school board to fund equitable remedies in federal litigation involving desegregation. In effect, the critical issue was whether the state's Tort Immunity Act authorized the board to levy taxes to fund expenses associated with complying with injunctive remedies imposed by another court. Insofar as the Supreme Court of Illinois affirmed that mandatory injunctive relief is not "compensatory damages," it decided that the board was not authorized to levy taxes to pay for desegregation remedies.[147] Similarly, the court explained that the Tort Immunity Act prohibited using tax dollars to pay debt service on general obligation bonds issued pursuant to the desegregation litigation.

Conclusion

Litigation continues as student and parental perceptions of individual rights conflict with school practices and policies. The courts continue to work with a new accommodation of religion while grappling with the precedents set decades ago. Sexual harassment has been defined, providing administrators and boards incentive to address, rather than ignore, situations occurring with employee-on-student abuse as well as student-on-student harassment.

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[144] Manning v. Sch. Bd. of Hillsborough County, 244 F.3d 927 [152 Educ. L. Rep. 51] (11th Cir. 2001), *cert. denied,* 122 S. Ct. 61 (2001).

[145] Hoots v. Commonwealth, 118 F. Supp.2d 577 [148 Educ. L. Rep. 806] (W.D. Pa. 2000).

[146] Berry v. Sch. Dist. of Benton Harbor, 141 F. Supp.2d 802 [154 Educ. L. Rep. 515] (W.D. Mich. 2001).

[147] *In re* Consolidated Objections To Tax Levies, 739 N.E.2d 508 [150 Educ. L. Rep. 795] (Ill. 2000).

Courts recognize the unitary status of school districts by ending decades-old desegregation cases across the country while admonishing boards to continue with the progress to prevent future segregation. The nature of the schools' interaction with pupils and the plethora of viewpoints ensure that disagreements and litigation will continue.

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BARGAINING

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Introduction

This chapter, which reviews more than forty cases related to collective bargaining between school boards and their employee unions construing various federal and state statutes, groups suits according to subject matter and within subjects. The chapter reports on seven federal cases, up from two last year. Among states with bargaining, Pennsylvania again had the most cases, followed by Indiana, Massachusetts, and New York.

Labor Organizations

The only case dealing with practices related to assessing and collecting union fees was in California, where nonunion employees sued both their unions and school superintendents for improper notice before they collected agency fees. The Ninth Circuit ruled that while the union did not provide an adequate "*Hudson* notice"[1] and the superintendents had a generalized duty to ensure that employees received proper notice, the latter had no affirmative duty to ensure that each individual employee received a proper "*Hudson* notice."[2]

Collective Bargaining

In the first of two cases addressing the obligation of school boards to engage in collective bargaining, the Supreme Court of South Dakota affirmed that a board improperly removed its reduction-in-force (RIF) and recall policy when it implemented its "last best offer" following an impasse in negotiations.[3] The court found that the procedural aspects relating to a RIF and recall were mandatory topics of negotiation under state law.

A dispute in Michigan arose over a public school academy that was established by plastics manufacturing companies with the assistance of a local board. An appellate court affirmed that since personnel decision-making power was explicitly reserved for the academy under the contract approved by the state department of education, the school board was not a joint employer with the company and so did not violate its own collective bargaining agreement by refusing to negotiate with its teachers' union over the academy's metal machine instructor vacancy.[4] The court disposed of a second unfair labor charge in deciding that the board interfered with a school nurse's right to join the union when her supervisor informed her that she risked losing her job if she did not cease her efforts to become a member of the bargaining unit.

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[1] See Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 310 [30 Educ. L. Rep. 649] (1986), which delineated three required procedural protections for nonunion members who must pay agency fees: (1) "an adequate explanation of the basis for the fee," (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while challenges are pending."

[2] Foster v. Mahdesian, 268 F.3d 689 [158 Educ. L. Rep. 73] (9th Cir. 2001).

[3] Webster Educ. Ass'n v. Webster Sch. Dist. No. 18-4, 631 N.W.2d 202 [155 Educ. L. Rep. 1381] (S.D. 2001).

In the first of three cases dealing with the composition of bargaining units, the Supreme Court of Vermont upheld a state labor relations board's adjudication that the involvement of three administrative assistants in a school board's collective bargaining activities was insufficient to label them "confidential employees" that precluded their becoming members of the unit.[5] Conversely, an appellate court in Pennsylvania posited that an assistant superintendent's secretary could not join a union for professional staff because she satisfied one of the two statutory criteria for being a confidential employee, namely that she worked in a close continuing relationship with a public officer associated with collective bargaining on behalf of the employer.[6]

An appellate court in Tennessee affirmed that provisions of a private act granting tenure to principals in a district were repealed by a public act of the state legislature.[7] As such, the court confirmed that the principals could not be considered members of the board's bargaining unit for issues under the control of the superintendent such as performance, accountability, and contract renewal, but could be for all issues remaining under the control of the school board.

Labor Contracts

The first of two cases on the rights of employees under their boards' RIF policies took place in Massachusetts. An appellate court affirmed that a tenured vocational school teacher who was laid off had the statutory right to bump an untenured teacher in another school even though she would be moving to a different bargaining unit.[8] The court remanded the dispute for the consideration of an appropriate damages award for the tenured teacher.

The Supreme Court of South Dakota affirmed an order of the state department of labor that a teacher's length of service did not have to be continuous for RIF purposes if his board's bargaining agreement did not explicitly include such a condition.[9] The court agreed that the department of labor properly found that summer school teaching could be considered in the calculation of the teacher's length of service absent contrary language in the agreement.

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[4] St. Clair County Intermediate Sch. Dist. v. St. Clair County Educ. Ass'n, 630 N.W.2d 909 [155 Educ. L. Rep. 1362] (Mich. Ct. App. 2001).

[5] Harwood Union High Sch. Dist. v. Harwood Educ. Ass'n, 773 A.2d 277 [154 Educ. L. Rep. 858] (Vt. 2001).

[6] North Hills Sch. Dist. v. Pa. Labor Relations Bd., 762 A.2d 1153 [149 Educ. L. Rep. 581] (Pa. Commw. Ct. 2000).

[7] Knox County Educ. Ass'n v. Knox County Bd. of Educ., 60 S.W.3d 65 [159 Educ. L. Rep. 802] (Tenn. Ct. App. 2001).

[8] Ballotte v. City of Worcester, 748 N.E.2d 987 [154 Educ. L. Rep. 297] (Mass. App. Ct. 2001).

[9] Gettysburg Sch. Dist. 53-1 v. Larson, 631 N.W.2d 196 [155 Educ. L. Rep. 1375] (S.D. 2001).

Another dispute over seniority rights saw the Supreme Judicial Court of Appeals of West Virginia explain that an administrative law judge acted arbitrarily and capriciously. The court pointed out that the judge failed to follow precedent and recognize seniority earned by a substitute bus driver "for time served under a contract for a position that was later determined to have been incorrectly awarded."[10]

In a case over a proposed settlement of a race/ethnicity/gender discrimination claim against a school board in New York, the Second Circuit vacated the denial of a motion for intervention as of right by white male employees whose seniority status might have been affected by the agreement.[11] In permitting the teachers to intervene, the court reasoned that their claims were neither too speculative and remote nor were the school board's interests sufficiently congruent with the interest of the teachers to justify the denial of their request to become involved in the dispute.

An appellate court in Minnesota affirmed that a principal whose position was eliminated was properly offered a teaching position by her school board.[12] The court indicated that reorganization of the board's organizational structure was a managerial prerogative not subject to bargaining.

In Massachusetts, an appellate court affirmed that an arbitrator's order to transfer three teachers to other positions under the provisions of their bargaining agreement was improper since the grievances were not arbitrable.[13] The court concluded that the provisions, which were not arbitrable, failed to recognize principals' statutory prior approval rights for all employee transfers.

Disputes and Concerted Activities

In Massachusetts, a school board's director of maintenance and transportation sued a union and a local newspaper for intentional interference with contractual relations and defamation, respectively. An appellate court affirmed that the union did not improperly interfere with the plaintiff's contract when its business agent sent a memo to the superintendent warning him of employee complaints about the director.[14] The court decided as a matter of first impression that the director was a public official and thus a grant of summary judgment in favor of the newspaper was appropriate since he could not show by clear and convincing evidence that its editors acted with actual malice in publishing four articles related to the employee complaints.

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[10] Hall v. Bd. of Educ. of Mingo, 541 S.E.2d 624, 629-30 [151 Educ. L. Rep. 293] (W. Va. 2000).

[11] Brennan v. N.Y. City Bd. of Educ., 260 F.3d 123 [156 Educ. L. Rep. 79] (2d Cir. 2001).

[12] State *ex rel.* Quiring v. Bd. of Educ. of Indep. Sch. Dist. No. 173, Mountain Lake, Minn., 623 N.W.2d 634 [152 Educ. L. Rep. 271] (Minn. Ct. App. 2001).

[13] School Comm. of Peabody v. Peabody Fed'n of Teachers, Local 1289, 748 N.E.2d 992 [154 Educ. L. Rep. 302] (Mass. App. Ct. 2001).

[14] Netherwood v. AFSCME, Local 1725, 757 N.E.2d 257 [158 Educ. L. Rep. 424] (Mass. App. Ct. 2001).

Unfair Labor Practices

The first two cases in this section dealt with charges of unfair labor practices against boards for reprisals against employees. In Oregon, an appellate court held that there was insufficient evidence to evaluate whether school board officials illegally reassigned a teacher. The court returned the dispute to the state employment relations board (SERB) with an order to consider whether the board's concern about the teacher's multiple absences for union activities was "sufficiently integral to or inherent in the exercise of the protected activity" such that reassigning her to less desirable classes in order to minimize parent complaints was "equivalent to basing it on the protected activity itself."[15]

In New York, an appellate court confirmed an adjudication of the state public employment relations board that a school board did not unlawfully dismiss a probationary teacher for union activity.[16] The court noted that there was substantial evidence of numerous other reasons justifying the nonrenewal of the teacher's contract.

Two other cases dealt with charges of unfair labor practices during bargaining. In the first, the Supreme Court of New Hampshire affirmed that a school board committed an unfair labor practice when it submitted a fact finder's recommendations to the local legislative body as separate warrant articles rather than as a whole.[17] The court wrote that the legislature intended negotiating teams, union members, and school boards to consider fact finders' recommendations as a total package and saw no justification for separating out the various recommendations for the legislative body to accept or reject.

In Ohio, an appellate court affirmed that a union did not refuse to bargain with a board's negotiating team.[18] The court asserted that when union representatives made statements at school board meetings and released information about negotiation proceedings to the local newspaper, they did not violate a provision in their contract against making progress reports to the local media.

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[15] Portland Ass'n of Teachers v. Multnomah Sch. Dist. No. 1, 16 P.3d 1189, 1206 [150 Educ. L. Rep. 931] (Or. Ct. App. 2000).

[16] Rockville Ctr. Teachers Ass'n v. N.Y. State Pub. Employment Relations Bd., 721 N.Y.S.2d 112 [151 Educ. L. Rep. 540] (N.Y. App. Div. 2001).

[17] *In re* Inter-Lakes Sch. Bd., 780 A.2d 1275 [157 Educ. L. Rep. 747] (N.H. 2001).

[18] Ohio Ass'n of Pub. Sch. Employees, Local 530 v. State Employment Relations Bd., 742 N.E.2d 696 [151 Educ. L. Rep. 241] (Ohio Ct. App. 2000).

Alternative Dispute Resolution

For the third year running, the greatest number of cases in this chapter pertained to alternative dispute resolution. These cases tended to focus on the arbitrability of particular issues, the content and process of alternative dispute resolution, and judicial review of arbitration proceedings.

A federal trial court in Pennsylvania dismissed the breach of contract claim of a teacher whose employment was terminated after he was arrested for multiple criminal offenses because he failed to exhaust administrative remedies before filing suit.[19] In addition, the court determined that the school board was not required to notify the teacher regarding COBRA benefits since a discharge for gross misconduct sufficiently relieved the board of its duties in this regard.

Arbitration Agreements

In a dispute over length of service, the Supreme Court of Nevada affirmed that the judiciary, rather than an arbitrator, had the authority to review the post-probationary status of a music teacher who transferred in from California.[20] The court further observed that the school board failed to comply with state notice and hearing requirements before dismissing the teacher.

The Supreme Court of Rhode Island was of the opinion that a school board had a nondelegable obligation to provide health services for students with special needs who were enrolled in a collaborative program, even if they were from other districts.[21] The court thus maintained that a school nurse's duty to dispense medication to those students was nonarbitrable.

An appellate court in Connecticut affirmed that an arbitrator did not have authority under a collective bargaining agreement to review the nonrenewal of a guidance counselor's contract at a Catholic high school.[22] The court acknowledged that since nothing in the contract made the nonrenewal of a nontenured counselor's contract subject to arbitration, there was no reason for it to disturb the earlier actions.

Proceedings and Award

Courts were satisfied that arbitrators properly exercised their authority under collective bargaining agreements or state statutes in all but the last of the six cases in this section. An appellate court in Connecticut affirmed that an arbitration panel did not exceed its powers in deciding that two custodial positions were not equivalent for purposes of an employee's transfer request.[23]

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[19] McKnight v. Sch. Dist. of Phila., 171 F. Supp. 2d 446 [159 Educ. L. Rep. 64] (E.D. Pa. 2001).

[20] Clark County Sch. Dist. v. Riley, 14 P.3d 22 [149 Educ. L. Rep. 615] (Nev. 2000).

[21] Woonsocket Teachers' Guild, Local 951 v. Woonsocket Sch. Comm., 770 A.2d 834 [153 Educ. L. Rep. 319] (R.I. 2001).

[22] Sacred Heart Teachers Ass'n v. Sacred Heart High Sch. Corp., 782 A.2d 227 [158 Educ. L. Rep. 386] (Conn. App. Ct. 2001).

In the first of two cases from Indiana, an appellate court affirmed that an arbitrator properly found that he did not have authority to reinstate a nonpermanent teacher absent language in the collective bargaining agreement giving arbitrators such authority.[24] In the second case, an appellate court was of the view that an arbitrator did not exceed his authority by imposing a lesser penalty than a school board's dismissal of a long-term substitute teacher who adjusted his underwear before, and showed his nipple ring to, a female eighth-grade student.[25] At the same time, the court judged that the board was not obligated to reinstate the teacher to a teaching position for the following year but could, instead, simply place him on the roster of eligible substitute teachers.

The federal trial court in Vermont ruled that a teacher who was dismissed was not collaterally estopped from filing claims under the Americans with Disabilities Act or the state's Fair Employment Practices Act.[26] The court was convinced that the suit could proceed since the arbitrator's resolution of the contractual claims was based solely on provisions of the bargaining agreement.

In Pennsylvania, an appellate court affirmed that since an arbitrator's order that a collective bargaining agreement between a school board and its teachers' union allowed retirees to receive both an early retirement bonus and payment for unused sick days was not irrational, it had to be upheld.[27] The court disregarded the arbitrator's error over the admissibility of parol evidence submitted by the board since the mistake did not deprive the board of a fair and complete opportunity to present its case.

Conversely, a second appellate court in Pennsylvania remarked that an arbitrator exceeded his authority in ordering a school board and teachers' union to negotiate a rate of compensation for teachers who were required to work beyond the end of a normal school day.[28] The court explained that this was necessary despite the arbitrator's having declared that the board did not violate the bargaining agreement by paying the teachers based on a rate schedule that it unilaterally established.

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[23] Local 1042 v. Bd. of Educ. of Norwalk, 784 A.2d 1018 [159 Educ. L. Rep. 286] (Conn. App. Ct. 2001).

[24] North Miami Educ. Ass'n v. N. Miami Cmty. Sch., 746 N.E.2d 380 [153 Educ. L. Rep. 352] (Ind. Ct. App. 2001).

[25] Fort Wayne Educ. Ass'n v. Fort Wayne Cmty. Sch., 753 N.E.2d 672 [156 Educ. L. Rep. 305] (Ind. Ct. App. 2001).

[26] Latouche v. N. Country Union High Sch. Dist., 131 F. Supp. 2d 568 [151 Educ. L. Rep. 817] (D. Vt. 2001).

[27] United Sch. Dist. v. United Educ. Ass'n, 782 A.2d 40 [157 Educ. L. Rep. 782] (Pa. Commw. Ct. 2001).

[28] Central Dauphin Sch. Dist. v. Cent. Dauphin Educ. Ass'n, 767 A.2d 16 [151 Educ. L. Rep. 532] (Pa. Commw. Ct. 2001).

Judicial Review and Enforcement of Decisions

The first of two cases pertaining to judicial review of arbitration awards arose in Ohio. An appellate court affirmed that a teacher lacked standing to challenge an arbitrator's conclusion that there was just cause for her dismissal since the only parties to the arbitration proceeding were the school board and his union.[29]

Similarly, an appellate court in Pennsylvania held that a teacher who was reinstated after arbitration lacked standing to challenge the arbitrator's refusal to award him back pay and benefits.[30] The court ascertained that the bargaining agreement gave the union exclusive authority to pursue arbitration and to challenge an arbitrator's action.

Labor Relations Boards and Proceedings

The Supreme Court of Indiana, in a case of first impression over a negotiated reduction of retirement benefits, reasoned that a breach of the duty of fair representation by a bargaining unit was an unfair labor practice subject to the exclusive jurisdiction of the state education employment relations board (SEERB).[31] The court added that, under the doctrine of primary jurisdiction, judicial review of the breach of contract claim filed by retired teachers against their former school board had to be suspended pending an adjudication by the SEERB in the charge against the union.

An appellate court in Illinois affirmed that the state educational labor relations board (SELRB) did not violate the state educational labor relations act when it reinstated a school custodian.[32] The court agreed that the SELRB could properly infer from the evidence that the custodian was discharged for protected union activity and that the school board would not have discharged him but for that activity.

In Oregon, an appellate court held that the SERB could not properly take notice of a letter sent to a teachers' union by the school district's attorney.[33] The court pointed out that the SERB should not have considered the letter since it was merely appended to a motion in the administrative record and was not formally submitted as evidence at a grievance hearing.

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[29] Coleman v. Cleveland Sch. Dist., 756 N.E.2d 759 [157 Educ. L. Rep. 857] (Ohio Ct. App. 2001).

[30] Kozura v. Tulpehocken Area Sch. Dist., 765 A.2d 424 [150 Educ. L. Rep. 463] (Pa. Commw. Ct. 2000).

[31] Fratus v. Marion Cmty. Sch. Bd. of Trs., 749 N.E.2d 40 [154 Educ. L. Rep. 642] (Ind. 2001).

[32] Board of Educ., Peoria Sch. Dist. No. 150 v. State of Ill. Educ. Labor Relations Bd., 741 N.E.2d 690 [152 Educ. L. Rep. 201] (Ill. App. Ct. 2000).

[33] Arlington Educ. Ass'n v. Arlington Sch. Dist. No. 3, 34 P.3d 1197 [159 Educ. L. Rep. 331] (Or. Ct. App. 2001).

Judicial Review and Enforcement of Labor Relations Boards' Decisions

A case involving health benefit issues arose in California where an appellate court ruled that state law entitled a part-time certified teacher to receive the health benefits accorded to full-time employees.[34] The court offered that a provision in a collective bargaining agreement permitting proration of health benefits for part-time teachers violated state law.

Teachers challenged the Wisconsin Employment Relations Commission's upholding two successive, integrated two-year bargaining contracts that their board entered into with their union. An appellate court noted that the commission did not violate the state's statutory mandate that educational bargaining agreements be no more than two years in length because each contract had a two-year term.[35]

In a case of first impression from Tennessee, an appellate court affirmed the rejection of a union's claim that the selection of a high school principal was subject to collective bargaining.[36] The court agreed that under state law only the school board had the authority to fill principalship vacancies.

Civil Liabilities

A teacher of Indian national origin who was dismissed filed fifteen separate causes of action against his school board and its teachers' union in a federal trial court.[37] Among its many decrees, the court asserted that employees of the board and the union could not be individually liable under either title VII or the Pennsylvania Human Rights Act (PHRA) and that the teacher failed to state valid title VII and PHRA claims against the union. The court further posited that the board was not an employer under the state wage statute, that the teacher was precluded from raising direct constitutional claims because he had an adequate remedy under section 1983, and that a number of federal and state law claims were barred because they were untimely. The court rounded out its order by denying the board's motions to dismiss the teacher's claims for alleged violations of title VII and PHRA and for improper notification regarding COBRA benefits.

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[34] Praiser v. Biggs Unified Sch. Dist., 104 Cal.Rptr. 551 [151 Educ. L. Rep. 198] (Cal. Ct. App. 2001).

[35] Hoffman v. Wis. Employment Relations Comm'n, 625 N.W.2d 906 [153 Educ. L. Rep. 764] (Wis. Ct. App. 2001).

[36] Carter County Bd. of Educ. v. Carter County Educ. Ass'n, 56 S.W.3d 1 [158 Educ. L. Rep. 465] (Tenn. Ct. App. 2001).

[37] Chatterjee v. Sch. Dist. of Phila., 170 F. Supp. 2d 509 [158 Educ. L. Rep. 676] (E.D. Pa. 2001).

In another federal case, teachers and their union filed a series of claims against their school board and various administrators for retaliation for protected union activity. A federal trial court in Texas indicated that the board was not liable for civil rights violations absent an official policy, custom, or practice depriving the teachers of a federally protected right.[38] Although it thought that the teachers' allegations were inadequate in this respect, the court allowed them to replead their complaint. In addition, the court maintained that one of the former teachers failed to state a cognizable section 1983 claim since harassment and threats of dismissal did not constitute an adverse employment action and dismissed the claims against individual administrators for failing to meet heightened pleading requirements.

An appellate court in Michigan affirmed the denial of a school board's motion for summary judgment when it was satisfied that a teacher who had been dismissed established the requisite facts under the state civil rights act to plead both quid pro quo sexual harassment and a hostile work environment.[39] Even so, the court denied the teacher's claim of intentional infliction of emotional distress and dismissed her breach of contract claim because it was expressly covered by her union contract.

In Washington, an appellate panel affirmed that a trial court improperly instructed the jury in a case over a school bus driver's dismissal for hosting a student-attended party at which alcohol was present.[40] The court observed that the jury was not instructed to consider a set of judicially established factors when determining whether the driver's conduct related to her performance as a bus driver and school employee.

An appellate court in New York affirmed that claims by teachers against their school board and union for both breach of contract and breach of duty of fair representation, respectively, were time barred by the statute of limitations.[41] The court specified that since the statute of limitations expired, there was no justification to grant the teachers' request to file a late notice of claim.

Wages and Hours Regulations

The Eighth Circuit was of the opinion that a female principal could properly reference the salaries of the two male employees who succeeded her in her gender discrimination suit against the school board that terminated her employment. Recognizing that the standards for unequal pay claims are the same under either title VII or the Equal Pay Act, the court commented that salary differences of $22,800 and $9,300 constituted a prima facie claim of gender discrimination in employment.[42] The court stated that the settlement of the principal's state claim challenging the nonrenewal of her contract did not preclude her pursuit of federal gender discrimination charges since it expressly reserved her right to pursue such a claim.

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[38] Classroom Teachers of Dallas v. Dallas Indep. Sch. Dist., 164 F. Supp. 2d 839 [157 Educ. L. Rep. 677] (N.D. Tex. 2001).

[39] Corley v. Detroit Bd. of Educ., 632 N.W.2d 147 [156 Educ. L. Rep. 314] (Mich. Ct. App. 2001).

[40] Ruchert v. Freeman Sch. Dist., 22 P.3d 841 [153 Educ. L. Rep. 424] (Wash. Ct. App. 2001).

[41] Dolce v. Bayport-Blue Point Union Free Sch. Dist., 728 N.Y.S.2d 772 [156 Educ. L. Rep. 285] (N.Y. App. Div. 2001).

An appellate court in New York ruled that although a school construction project was a public work within the purview of a prevailing state wage statute, student trainees working on it should not have been classified as employees.[43] The court wrote that the students were not covered by the law since their participation was for the purpose of instructional training for future employment.

Conclusion

Although this chapter covered three more volumes of West's *Educational Law Reporter* than last year, only a handful more cases involving collective bargaining in elementary and secondary schools were reported in the Labor Relations section. As has been the trend for several years now, the area of alternative dispute resolution had the most cases; common issues were the arbitrability of negotiations or grievance concerns and the scope of arbitrators' authority. Insofar as arbitration is relatively new even in those states that allow it, these case trends are likely to continue in the years to come.

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[42] Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210 [154 Educ. L. Rep. 452] (8th Cir. 2001).

[43] Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. v. McGowan, 728 N.Y.S.2d 109 [155 Educ. L. Rep. 1310] (N.Y. App. Div. 2001).

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STUDENTS WITH DISABILITIES

Allan G. Osborne, Jr.

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Introduction

Just as it has for the past two decades, litigation over the rights of students with disabilities continued at a significant pace in 2001. As in past years, much of the litigation involved procedural issues and contested placement decisions under the Individuals with Disabilities Education Act (IDEA).[1] A majority of the cases dealt with procedural and dispute resolution issues. As always, the courts were asked to determine whether school boards offered students a free appropriate public education. A large number of cases concerned reimbursement of legal expenses to prevailing parents in special education disputes.

Cases may be filed on behalf of students with disabilities under section 504 of the Rehabilitation Act[2] and the Americans with Disabilities Act (ADA)[3] as well as the IDEA. In most of these suits the plaintiffs alleged that a student was subjected to discriminatory treatment on the basis of a disability.

Entitlement to Services

The IDEA requires school boards to provide students with disabilities with a free appropriate public education (FAPE), consisting of any needed special education and related services.[4] Even so, the IDEA does not establish any substantive standards by which the services can be judged to be adequate. The IDEA mandates that a student is to be afforded specially designed instruction[5] in conformance with his or her Individualized Education Program (IEP).[6] In *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Supreme Court held that a student with a disability is entitled to personalized instruction with support services sufficient to permit the child to benefit from the education provided.[7] In addition, the Court has cautioned lower courts not to impose their views of preferable educational methods on school boards.[8] Even so, the courts are frequently asked to evaluate what level of services is required to meet the IDEA's minimum standards. Students attending private schools also are entitled to some benefits of the IDEA.[9]

The Eighth Circuit stated that the factor controlling eligibility under the IDEA is not whether a student's problem is educational or noneducational, but whether it needs to be addressed in order for the child to learn.[10] The court thus ruled that because a student's social and emotional problems prevented her from receiving educational benefit, she was entitled to receive special education services.

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[1] 20 U.S.C. § 1400 *et seq.*

[2] 29 U.S.C. § 794.

[3] 42 U.S.C. §§ 12101 - 12213.

[4] 20 U.S.C. §§ 1401(8) and 1412(a)(1)A).

[5] 20 U.S.C. § 1401(25).

[6] 20 U.S.C. §§ 1401(11) and 1414(d).

[7] 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[8] *Id.*

[9] 20 U.S.C. § 1412(a)(10)(A)(i).

[10] Independent Sch. Dist. No. 284 v. A.C., 258 F.3d 769 [155 Educ. L. Rep. 1065] (8th Cir. 2001).

A federal trial court in Texas ascertained that a student who attended a magnet program for gifted students, but who had attention deficit disorder, did not need special education.[11] Instead, the court maintained that the student needed to commit to doing homework and regularly attend classes.

According to a state court in Pennsylvania, rather than relieve a school board of its obligation to provide services to a student in a parochial school, the 1997 IDEA amendments only excused it from the obligation to provide them at the nonpublic school.[12] Here the board provided similar services to public school students in a district-owned facility and could have easily provided them, in the same place, to the child from the nonpublic school.

In vacating a trial court's judgment, the Second Circuit declared that the IDEA is not applicable to private schools in which public agencies may place students.[13] The case involved a student from New York who was denied mainstreaming at an independent school which most of the district's students attended because the board did not operate its own high school. The court permitted the student to be denied mainstreaming opportunities because he did not meet the academy's minimum academic requirements for such a placement.

Where a student with disabilities lived with his mother, his father, who resided in another school district, requested special education services from the system within which he resided. The federal trial court for the District of Columbia rejected the request on the basis that the student was not entitled to receive the requested services because Congress did not intend for one state to bear the cost of special education for children who resided in another state.[14]

Procedural Safeguards

The IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to its mandates.[15] The IDEA makes it clear that the parents or guardians of a child with disabilities must be provided with an opportunity to participate in the development of the Individualized Education Program (IEP) for, and placement of, their child.[16] The IDEA also requires school boards to provide written notice and obtain parental consent prior to evaluating a child[17] or making an initial placement.[18] Once a student is placed in special education, a board must provide parents with proper notice before initiating a change in placement.[19] Once placed, a student's situation must be reviewed at least annually[20] and the child must be reevaluated at least every three years.[21]

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[11] Austin Indep. Sch. Dist. v. Robert M., 168 F. Supp.2d 635 [158 Educ. L. Rep. 352] (W.D. Tex. 2001).

[12] Veschi v. Northwestern Lehigh Sch. Dist., 772 A.2d 469 [154 Educ. L. Rep. 218] (Pa. Commw. Ct. 2001).

[13] St. Johnsbury Acad. v. D.H., 240 F.3d 163 [151 Educ. L. Rep. 74] (2d Cir. 2001).

[14] Pestronk v. District of Columbia, 150 F. Supp.2d 147 [155 Educ. L. Rep. 498] (D.D.C. 2001).

[15] 20 U.S.C. § 1415.

[16] 20 U.S.C. §§ 1414(d)(1)(B)(i) and 1414(f).

Under the IDEA, the parents of a student with a disability may be entitled to an independent evaluation at public expense if they disagree with a school board's evaluation.[22] However, in an administrative hearing, a board may challenge the request for an independent evaluation; if a hearing officer decides that the board's evaluation was appropriate, the parents are not entitled to have an independent evaluation at public expense.[23]

The IDEA stipulates that an IEP must contain statements of a child's current educational performance, annual goals and short-term objectives, the specific educational services to be provided, the extent to which a student can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine if the objectives are being met.[24] An IEP must also include statements concerning how a student's disability affects the ability to be involved in and progress in the general educational curriculum, along with addressing any modifications necessary to allow a child to participate in the general curriculum.

Evaluation and Classification

The federal trial court in Oregon found that the IDEA does not require school personnel to perform their own assessments as long as they have sufficient information to develop an IEP.[25] The court asserted that school authorities have discretion to consider what assessments may be necessary in a particular situation.

In Alabama, a federal trial court decided that a student with academic and behavioral problems was not emotionally disturbed as defined under the IDEA.[26] The court based its judgment on the fact that the student often acted appropriately.

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[17] 20 U.S.C. § 1414(a)(1)(C).

[18] 20 U.S.C. § 1415(b)(3).

[19] 20 U.S.C. § 1415(b)(3)(A).

[20] 20 U.S.C. § 1414(d)(4)(A).

[21] 20 U.S.C. § 1414(a)(2)(A).

[22] 20 U.S.C. § 1415(b)(1).

[23] 34 C.F.R. § 300.502(b).

[24] 20 U.S.C. § 1414(d)(1)(A).

[25] Pitchford *ex rel.* M. v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp.2d 1213 [156 Educ. L. Rep. 555] (D. Or. 2001).

[26] Maricus W. v. Lanett City Bd. of Educ., 141 F. Supp.2d 1064 [154 Educ. L. Rep. 525] (M.D. Ala. 2001).

The federal trial court for the District of Columbia was of the opinion that a student whose test scores were uniformly low was properly classified as mentally retarded.[27] The court was convinced that two thorough, comprehensive, professional evaluations performed by psychologists of unchallenged qualification were correct in classifying the student as mentally retarded.

Rights of Parents or Guardians

The Eighth Circuit affirmed that a school board in Nebraska violated the IDEA by not providing special education to a student whose parents failed to provide information that would have helped school officials evaluate the child.[28] Similarly, a federal trial court in Wisconsin noted that school officials were not unreasonable in hesitating to move forward with an evaluation without parental approval.[29] The court explained that in light of the IDEA's emphasis on parental participation, the school board's failure to proceed with an evaluation did not constitute a procedural default so harmful and serious that it could be said to have denied the student an educational benefit.

Development of Individualized Education Programs (IEPs)

A federal trial court in Oregon observed that the failure of a knowledgeable representative of a school board to be present at an IEP conference violated the IDEA since this denied the parents an opportunity to discuss the services that had been provided and the resources available for change.[30] On the other hand, a state court in Virginia wrote that a school board's failure to include a teacher from the private school that a student attended on an IEP team neither hampered his parents' opportunity to participate in the development of his IEP nor resulted in his suffering a loss of educational opportunity or benefit.[31]

In Florida, a state court indicated that although a school board should invite other agencies involved with a student to his IEP meeting, an administrative law judge could not order officials to take specific action to ensure the attendance of representatives of those agencies.[32] In the same action, the court contended that the administrative law judge's determination that the student's next IEP should detail methodologies for how progress toward annual goals was to be measured was nothing more than a confirmation of the standards already articulated by the IDEA.

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[27] Walker v. District of Columbia, 157 F. Supp.2d 11 [156 Educ. L. Rep. 602] (D.D.C. 2001).

[28] Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 [157 Educ. L. Rep. 520] (8th Cir. 2001).

[29] Suzawith v. Green Bay Area Sch. Dist., 132 F. Supp.2d 718 [151 Educ. L. Rep. 886] (E.D. Wis. 2000).

[30] Pitchford *ex rel.* M. v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp.2d 1213 [156 Educ. L. Rep. 555] (D. Or. 2001).

[31] White v. Sch. Bd. of Henrico County, 549 S.E.2d 16 [155 Educ. L. Rep. 893] (Va. Ct. App. 2001).

[32] School Bd. of Lee County v. S.W., 789 So. 2d 1162 [156 Educ. L. Rep. 348] (Fla. Dist. Ct. App. 2001).

A school board in New York challenged the action of an IEP team chair who decided that while a vote would be taken on a proposed program, not all participants in the conference could vote. A state court reasoned that if school authorities opt to resolve impasses by taking a vote, all members of an IEP committee must be allowed to participate.[33] In the interim, the Department of Education pointed out that it is inappropriate to create an IEP by voting.[34]

In Michigan, a federal trial court was of the view that an IEP containing short-term objectives, performance criteria, evaluation procedures, and schedules for evaluation met the requirements of the law.[35] The IEP also addressed each subject area and stated how improvements would be evaluated and at what intervals. On the other hand, the Sixth Circuit invalidated an IEP for a student from Ohio that did not contain a summary of parental rights, failed to explain the placement options considered and why certain options were rejected, and did not describe the evaluations, procedures, tests, records, or reports that were used as a basis for the school board's proposed placement.[36] Yet, the federal trial court in Delaware acknowledged that flaws in an IEP do not always rise to the level of an IDEA violation if they do not hamper parents' opportunity to participate in the development of the IEP.[37]

IEP team members in Connecticut discussed adding additional personnel to a student's program, but never included the additional person in the student's IEP. When parents filed suit over the team's failure to add the extra member, the federal trial court posited that this did not violate the law.[38] The court commented that the mere fact that the participants in an IEP meeting discussed an educational service does not translate into an entitlement to the service.

The Sixth Circuit remarked that the failure of a school board in Ohio to conduct an IEP conference and develop an IEP within prescribed time limits denied parents the opportunity to participate meaningfully in the process and resulted in the loss of educational opportunity for the child.[39] Similarly, the federal trial court for the District of Columbia was satisfied that a school board violated the IDEA by failing to provide a student with timely IEPs.[40]

According to the Ninth Circuit, the failure of school officials in Nevada to disclose a student's full records to her parents violated the IDEA where educators suspected the student was autistic but never informed her parents of their concerns.[41] The court explained that the development of a proper IEP was delayed, thereby resulting in the child's being denied a FAPE.

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[33] Sackets Harbor Cent. Sch. Dist. v. Munoz, 725 N.Y.S.2d 119 [154 Educ. L. Rep. 253] (N.Y. App. Div. 2001).

[34] 34 C.F.R. § 300 Appendix A.

[35] Kuszewski v. Chippewa Valley Schs., 131 F. Supp.2d 926 [151 Educ. L. Rep. 845] (E.D. Mich. 2001).

[36] Knable v. Bexley City Sch. Dist., 238 F.3d 755 [150 Educ. L. Rep. 628] (6th Cir. 2001).

[37] Coale v. State Dep't of Educ., 162 F. Supp.2d 316 [157 Educ. L. Rep. 142] (D. Del. 2001).

[38] W.A. v. Pascarella, 153 F. Supp.2d 144 [156 Educ. L. Rep. 168] (D. Conn. 2001).

[39] Knable v. Bexley City Sch. Dist., 238 F.3d 755 [150 Educ. L. Rep. 628] (6th Cir. 2001).

[40] Walker v. District of Columbia, 157 F. Supp.2d 11 [156 Educ. L. Rep. 602] (D.D.C. 2001).

[41] Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 [157 Educ. L. Rep. 562] (9th Cir. 2001).

Change in Placement

The Tenth Circuit held that a school board in Oklahoma was not required to convene an IEP meeting prior to considering whether a special education student could graduate.[42] Even though graduation is a change in placement, the court declared that the regulations specifically stated that an evaluation is not required before a student's benefits terminate due to graduation.

In Illinois, a student who attended regular education classes throughout elementary school transferred to a middle school while an appeal to his placement in special education was pending. A federal trial court ruled that the student was entitled to remain in a regular classroom situation pending the completion of the appeals process.[43]

A federal trial court in New York ordered a school board to continue paying a student's tuition at a private school during the pendency of administrative proceedings.[44] The court ascertained that a hearing officer fixed the private school as the student's current educational placement and that in intervening agreements the parties maintained it as such. Another federal trial court in New York upheld a hearing officer's adjudication that the private school that a child attended was the student's pendant placement.[45]

Dispute Resolution

If parents disagree with a school board's actions regarding a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing.[46] Any party not satisfied with the final result of an administrative proceeding may appeal to a state or federal court;[47] however, all administrative remedies must be exhausted prior to resorting to the courts unless it is futile to do so. While an administrative or judicial action is pending, a school board may not change a student's placement without parental consent,[48] a hearing officer's order,[49] or a court order.[50]

The IDEA empowers the courts to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.[51]

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[42] T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090 [157 Educ. L. Rep. 484] (10th Cir. 2001).

[43] Beth B. v. Van Clay, 126 F. Supp.2d 532 [150 Educ. L. Rep. 424] (N.D. Ill. 2000).

[44] Board of Educ. of the Pawling Cent. Sch. Dist. v. Schutz, 137 F. Supp.2d 83 [153 Educ. L. Rep. 149] (N.D.N.Y. 2001).

[45] Board of Educ. of the Pine Plains Cent. Sch. Dist. v. Engwiller, 170 F. Supp.2d 410 158 [Educ. L. Rep. 670] (S.D.N.Y. 2001).

[46] 20 U.S.C. §§ 1415(f)(g).

[47] 20 U.S.C. § 1415(i)(2)(B).

[48] 20 U.S.C. § 1415(j).

[49] 20 U.S.C. § 1415(k)(2).

[50] Honig v. Doe, 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).

[51] 20 U.S.C. § 1415(i)(2)(B).

However, in *Rowley*, the Supreme Court has cautioned judges not to substitute their views of proper educational methodology for that of competent school authorities.[52] Yet, since the IDEA does not contain a statute of limitations for filing suit, courts must borrow one from analogous state laws.

In 1997 Congress amended the IDEA to insert language providing for the resolution of disputes through mediation as an alternative to an adversarial proceeding.[53] Mediation is voluntary and may not be used to deny or delay a parent's right to an administrative hearing.

The 1990 Amendments to the IDEA specifically abrogated the states' Eleventh Amendment immunity to suits in federal courts for any actions that occurred after October 30, 1990.[54] This change was enacted in response to the Supreme Court's interpretation of the IDEA as not specifically abrogating states' sovereign immunity in *Dellmuth v. Muth*.[55]

Administrative Hearings

The following suits address whether parents were required to exhaust administrative remedies before taking their complaints to court. A federal trial court in Texas answered in the affirmative when a parent failed to demonstrate either the futility or inadequacy of the administrative process.[56]

In a case from Oklahoma, the Tenth Circuit affirmed that a student was not entitled to a hearing.[57] The court indicated that a hearing officer did not have jurisdiction to hear the student's claims because he graduated and had not challenged his graduation. In addition, the court reflected that any procedural defects were harmless.

Parents in Pennsylvania unsuccessfully argued that their school board's failure to consummate a settlement agreement was evidence that administrative proceedings would be futile.[58] In rejecting this argument, a federal trial court asserted that differences between the parties were not enough to show futility. The court further decreed that the form of relief sought by the parents—tuition reimbursement—was available through the administrative process. Along similar lines, the federal trial court in Kansas noted that a parental contention that a school board failed to properly formulate and implement an IEP did not satisfy the futility exception.[59] The court also discerned that the parents' argument, that they should be excused from the exhaustion requirement because they sought remedies beyond the scope of the IDEA, was without merit.

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[52] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[53] 20 U.S.C. § 1415(e).

[54] 20 U.S.C. § 1403.

[55] 491 U.S. 223 [53 Educ. L. Rep. 792] (1989).

[56] Doe v. S & S Consol. Indep. Sch. Dist., 149 F. Supp.2d 274 [155 Educ. L. Rep. 370] (E.D. Tex. 2001).

[57] T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090 [157 Educ. L. Rep. 484] (10th Cir. 2001).

[58] Falzett v. Pocono Mountain Sch. Dist., 150 F. Supp.2d 699 [155 Educ. L. Rep. 530] (M.D. Pa. 2001).

[59] Marlana G. v. Unified Sch. Dist. No. 497, Douglas County, 167 F. Supp.2d 1303 [158 Educ. L. Rep. 328] (D. Kan. 2001).

The Supreme Court of Hawaii vacated a judgment of a family court over appropriate remedies under the IDEA.[60] The panel maintained that the lower court lacked jurisdiction because the parties failed to exhaust administrative remedies under the IDEA.

Parents in California unsuccessfully filed suit claiming that a school board failed to provide the compensatory education ordered by a hearing officer.[61] A federal trial court dismissed on the ground that since state regulations provided the proper avenue for enforcing a hearing officer's order, the parents should have followed that scheme. The court also observed that the parents had to exhaust administrative remedies under the IDEA before filing a section 1983 claim.

As reflected by a case from Pennsylvania, not all courts required parents to exhaust administrative remedies. The court permitted parents who sought compensatory and punitive damages to proceed directly to judicial review because the administrative process was not capable of providing the relief they desired.[62] Another federal trial court in Pennsylvania found that a parent did not have to exhaust administrative remedies after school officials not only failed to show up for a scheduled hearing but also did not implement the resulting administrative order.[63] The court was of the opinion that the school board impeded and frustrated the parent's attempts to pursue administrative remedies to the point of futility.

In a situation where two different hearing officers failed to issue a timely order, a federal trial court in New York directed state officials to act within ten days.[64] The court explained that it would resolve the dispute if an adjudication was not rendered within that time period. The court also offered that the state violated the due process rights of both the parent and child by failing to insure that a timely decision was rendered. Once the results of a hearing were issued within the required ten-day period, the court dismissed the action.

Court Proceedings

Where a student in Hawaii claimed that he did not receive a FAPE for eight weeks, the federal trial court declared that the case was moot because he had graduated from high school and there was no effective relief available.[65] Similarly, the Second Circuit reasoned that a long-standing suit in New York was moot not only because the student graduated but also because a favorable outcome would not have provided him with any benefit.[66]

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[60] *In re* Doe Children, 30 P.3d 878 [156 Educ. L. Rep. 1416] (Haw. 2001).

[61] Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist., 123 F. Supp.2d 1187 [149 Educ. L. Rep. 769] (C.D. Cal. 2000).

[62] Ronald D. *ex rel.* Timothy D. v. Titusville Area Sch. Dist., 159 F. Supp.2d 857 [156 Educ. L. Rep. 944] (W.D. Pa. 2001).

[63] Timothy B. v. Neshaminy Sch. Dist., 153 F. Supp.2d 621 [156 Educ. L. Rep. 181] (E.D. Pa. 2001).

[64] Engwiller v. Pine Plains Cent. Sch. Dist., 199 F.R.D. 127 [152 Educ. L. Rep. 133] (S.D.N.Y. 2001).

In another case from the Second Circuit, the court decided that an award of compensatory education for a student in Vermont preserved the dispute from mootness.[67] In like manner, the Eighth Circuit was of the view that a suit for compensatory educational services was not moot even though the student from Minnesota moved to another school district[68] while a federal trial court in Indiana was convinced that the possibility of compensatory services preserved a suit where the student graduated and was beyond the age of eligibility for services.[69] In the latter case, the court wrote that graduation does not necessarily mean that a student received a FAPE.

The federal trial court in Maryland agreed to admit evidence concerning a student's progress at a private school where he was unilaterally placed by his parents.[70] The court reasoned that the evidence properly supplemented the record by giving it a complete picture of the child and whether the private school could meet his special needs.

In Hawaii, the federal trial court prevented the state from relitigating the appropriateness of a student's IEP and a hearing officer's reimbursement order since it had not appealed the order.[71] Essentially, the court posited that the state waived its right to challenge the initial adjudication.

The Eleventh Circuit pointed out that the party challenging an IEP bears the burden of proof.[72] The court judged that when a child is currently learning in a program that is jointly developed by school officials and the parents, the party challenging the placement should show why it is inadequate.

In Nevada, which has a two-tiered administrative scheme, a reviewing officer overturned a credibility determination of the initial hearing officer, but did not hear testimony. The Ninth Circuit was satisfied that even though deference is normally given to the final action in a two-tiered system, due weight was not warranted because the reviewing officer's judgment deviated from the credibility determination of a witness that only the hearing officer heard testify.[73]

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[65] Browell v. LeMahieu, 127 F. Supp.2d 1117 [150 Educ. L. Rep. 732] (D. Haw. 2000).

[66] Russman v. Bd. of Educ. of the Enlarged City Sch. Dist. of Watervliet, 260 F.3d 114 [156 Educ. L. Rep. 70] (2d Cir. 2001).

[67] St. Johnsbury Acad. v. D.H., 240 F.3d 163 [151 Educ. L. Rep. 74] (2d Cir. 2001).

[68] Independent Sch. Dist. No. 284 v. A.C., 258 F.3d 769 [155 Educ. L. Rep. 1065] (8th Cir. 2001).

[69] Brett v. Goshen Cmty. Sch. Corp., 161 F. Supp.2d 930 [157 Educ. L. Rep. 84] (N.D. Ind. 2001).

[70] Justin G. v. Bd. of Educ. of Montgomery County, 148 F. Supp.2d 576 [155 Educ. L. Rep. 346] (D. Md. 2001).

[71] Patricia N. v. LeMahieu, 141 F. Supp.2d 1243 [154 Educ. L. Rep. 532] (D. Haw. 2001).

[72] Devine v. Indian River County Sch. Bd., 249 F.3d 1289 [153 Educ. L. Rep. 871] (11th Cir. 2001).

[73] Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 [157 Educ. L. Rep. 562] (9th Cir. 2001).

Standing to Sue

In a per curiam opinion, the Seventh Circuit acknowledged that a noncustodial parent in Illinois had standing to sue.[74] Even though the divorce decree gave the mother, as custodial parent, the right to make educational decisions, the court remarked that nothing in it stripped the father of his parental interest in educational matters.

Statute of Limitations

In a case from North Carolina, the Fourth Circuit held that the statute of limitations for IDEA actions was sixty days as provided for by the state's special education statute.[75] However, the court added that pursuant to the same statute, school authorities were clearly required to inform parents of the limitations period which commenced only when they received notice.

The Ninth Circuit ruled that Oregon's Tort Claims Act provided the applicable statute of limitations for a claim of tuition reimbursement because it fell within the statutory definition of a tort.[76] The court also posited that the two-year limitations period was consistent with the policy underlying the IDEA. Similarly, the federal trial court in Hawaii concluded that the state's two-year statute of limitations for personal injury claims was most analogous to a claim for tuition reimbursement.[77]

Placement

The IDEA regulations require school boards to ensure that a "continuum of alternative placements" exists to meet the needs of students with disabilities for special education and related services.[78] The continuum must range from placement in general education to a private residential facility and must include homebound services. Further, the placement for any student must be in the least restrictive environment (LRE) and removal from general education can occur only to the extent necessary to provide special education and related services.[79] All placements must be made at public expense and must meet state educational standards.[80] Each placement must be reviewed at least annually and revised if necessary.[81]

In *Rowley*, the Supreme Court has declared that an appropriate education is one that is developed in compliance with the IDEA's procedures and is reasonably calculated to enable a child to receive educational benefits.[82] Although states must adopt policies and procedures consistent with the IDEA, they may provide greater benefits than those required by federal law. If a state establishes higher standards, courts will consider them when evaluating an IEP's appropriateness.[83]

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[74] Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147 [158 Educ. L. Rep. 576] (7th Cir. 2001).

[75] C.M. *ex rel.* J.M. v. Bd. of Educ. of Henderson County, 241 F.3d 374 [151 Educ. L. Rep. 157] (4th Cir. 2001).

[76] S.V. v. Sherwood Sch. Dist., 254 F.3d 877 [155 Educ. L. Rep. 52] (9th Cir. 2001).

[77] Patricia N. v. LeMahieu, 141 F. Supp.2d 1243 [154 Educ. L. Rep. 532] (D. Haw. 2001).

[78] 34 C.F.R. § 300.551.

[79] 20 U.S.C. § 1412(a)(5).

[80] 20 U.S.C. § 1401(8).

[81] 20 U.S.C. § 1414(d)(4).

Appropriate Educational Placement

A federal trial court in Louisiana contended that a public school program that was individualized on the basis of a student's assessments and performance, that accounted for his academic and vocational needs, and that addressed his particular needs was appropriate.[84] In addition, the court ascertained that the IEP was implemented in the LRE, that in the past the student demonstrated positive academic and nonacademic benefits, and that the student made progress toward his IEP goals. Similarly, a state court in Virginia believed that an IEP that offered a student extensive special education services and extensive modifications in his regular education classes was appropriate.[85] The court relied on evidence that the student made progress in the past in a program with lesser services.

In Maryland, the federal trial court acted on evidence of past performance in finding that a recommended program was reasonably suited to the needs of a student with a learning disability and that the curriculum would provide her with educational benefit.[86] In a similar vein, the federal trial court in Delaware was persuaded by objective test results and subjective teacher evaluations, which indicated that a student was making significant progress in academic areas, in stating that the child received an appropriate education.[87]

The federal trial court in Oregon noted that there was substantial evidence to support a school board's selection of a TEACCH-based method of instruction for a student with autism and that it was reasonably calculated to afford educational benefit.[88] The parents had advocated for the adoption of a Lovaas method.

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[82] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[83] *See e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 [28 Educ. L. Rep. 70] (1st Cir. 1985); Geis v. Bd. of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 [27 Educ. L. Rep. 1093] (3d Cir. 1985).

[84] Pace v. Bogalusa City Sch. Bd., 137 F. Supp.2d 711 [153 Educ. L. Rep. 175] (E.D. La. 2001).

[85] White v. Sch. Bd. of Henrico County, 549 S.E.2d 16 [155 Educ. L. Rep. 893] (Va. Ct. App. 2001).

[86] Steinberg v. Weast, 132 F. Supp.2d 343 [151 Educ. L. Rep. 879] (D. Md. 2001).

[87] Coale v. State Dep't of Educ., 162 F. Supp.2d 316 [157 Educ. L. Rep. 142] (D. Del. 2001).

[88] Pitchford *ex rel.* M. v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp.2d 1213 [156 Educ. L. Rep. 555] (D. Or. 2001).

In New Hampshire, the federal trial court upheld a hearing officer's adjudication that a school board's disciplinary system and placement proposals were appropriate for a student with a history of attentional and emotional difficulties.[89] The court agreed that the judgment was supported by the record.

A federal trial court in Michigan maintained that an IEP that met both the federal and higher state standards by allowing a student to be educated to his maximum potential was appropriate.[90] Similarly, in Massachusetts, another state with a higher standard of appropriateness than the IDEA, the federal trial court ascertained that an IEP assuring the student's maximum possible educational development was appropriate.[91] Moreover, the federal trial court in Maryland observed that a proposed program that provided the services listed in a child's IEP, along with class size and teacher-to-student ratio suited to his needs, was appropriate.[92]

After discovering that evidence supported the finding that a classroom had physical problems, while the curriculum and instructional program in a proposed IEP were inappropriate for a child who is hearing impaired, an appellate court in Tennessee explained that the school board had not offered an appropriate educational placement.[93] Specifically, the court discerned that the curriculum was not designed for students with hearing impairments and that the teacher had not received formal training or certification in deaf education.

The Eleventh Circuit reasoned that the fact that a student in Florida demonstrated serious behavioral problems at home did not render his special education program inappropriate.[94] The child's parents had argued that the program was inadequate because the student could not generalize learned skills across settings. According to the court, generalization across settings is not required to show educational benefit. The court also discounted a parental argument that the IEP was not sufficient on the ground that it failed to provide respite care for the family since the parents failed to show how this would have benefited the child. On the other hand, the First Circuit, in dicta, reflected that evidence revealed that a Maine student's behavior problems at home spilled over into school and interfered with his ability to obtain educational benefit.[95]

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[89] J.W. *ex rel.* K.W. v. Contoocook Valley Sch. Dist., 154 F. Supp.2d 217 [156 Educ. L. Rep. 224] (D.N.H. 2001).

[90] Kuszewski v. Chippewa Valley Schs., 131 F. Supp.2d 926 [151 Educ. L. Rep. 845] (E.D. Mich. 2001).

[91] Douglas W. *ex rel.* Douglas W. v. Greenfield Pub. Schs., 164 F. Supp.2d 157 [157 Educ. L. Rep. 648] (D. Mass. 2001).

[92] Justin G. v. Bd. of Educ. of Montgomery County, 148 F. Supp.2d 576 [155 Educ. L. Rep. 346] (D. Md. 2001).

[93] Wilson County Sch. Sys. v. Clifton, 41 S.W.3d 645 [153 Educ. L. Rep. 433] (Tenn. Ct. App. 2000).

[94] Devine v. Indian River County Sch. Bd., 249 F.3d 1289 [153 Educ. L. Rep. 871] (11th Cir. 2001).

[95] Rome Sch. Comm. v. Mrs. B., 247 F.3d 29 [153 Educ. L. Rep. 42] (1st Cir. 2001).

In Indiana, a federal trial court, writing that a student's graduation was not a sham, was of the opinion that he received a FAPE.[96] Although the student had not taken the normal path to graduation, the court was convinced he met all of the necessary requirements.

The federal trial court in Maine maintained that an IEP, which was written to cover a period of time in which a student would have been expelled, was not rendered inappropriate by the fact that it did not include all of the subjects he took while enrolled in school.[97] The court judged that the student still had the opportunity to obtain the credits and skills needed for graduation.

Least Restrictive Environment (LRE)

Parents in Michigan challenged a school board's proposed placement for their daughter, who had Down's Syndrome, that was not in their neighborhood school. A federal trial court in Michigan was of the view that the proposed placement was not the LRE because there was no support for the proposition that the student would not benefit from placement at her neighborhood school.[98] Further, the court posited that the student's IEP goals did not require placement elsewhere and there was no evidence that she would have been disruptive in her neighborhood school.

A federal trial court in Pennsylvania acknowledged that a regular classroom was the LRE for a student who had an IQ score of thirty-six and achievement commensurate with that level.[99] The court agreed with evidence revealing that the student made academic and social progress in regular education in the past and was achieving at an appropriate level. The court concluded that, in the past, the student's teachers had not made meaningful attempts to include him in activities.

Private Facilities

Problems students experienced at home figured in cases involving requested residential placements. Where a student from Minnesota had school-related problems including classroom disruption, using profanity, insubordination, and truancy as well as out-of-school difficulties with alcohol and illegal drugs, sexual promiscuity, running away from home, forging checks, and suicide attempts, the Eighth Circuit pointed out that a residential placement was required.[100] The court, believing that a residential placement was necessary to correct the student's behavioral and emotional problems, remarked that she would not receive educational benefit in a less restrictive environment. On the other hand, the First Circuit held that a residential placement for a student from Puerto Rico was not necessary when problems at home did not affect his ability to learn.[101] The court declared that since the parents' safety concerns were separable from the student's educational problems, they were an insufficient ground on which to justify a residential placement.

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[96] Brett v. Goshen Cmty. Sch. Corp., 161 F. Supp.2d 930 [157 Educ. L. Rep. 84] (N.D. Ind. 2001).

[97] Farrin v. Me. Sch. Admin. Dist. No. 59, 165 F. Supp.2d 37 [157 Educ. L. Rep. 709] (D. Me. 2001).

[98] McLaughlin v. Bd. of Educ. of Holt Pub. Schs., 133 F. Supp.2d 994 [152 Educ. L. Rep. 571] (W.D. Mich. 2001).

[99] Girty *ex rel.* Girty v. Sch. Dist. of Valley Grove, 163 F. Supp.2d 527 [157 Educ. L. Rep. 617] (W.D. Pa. 2001).

[100] Independent Sch. Dist. No. 284 v. A.C., 258 F.3d 769 [155 Educ. L. Rep. 1065] (8th Cir. 2001).

Stating that all a residential school did was provide confinement, the Seventh Circuit determined that such a placement was not required for a child in Illinois.[102] The court was satisfied that since the student's problems, which included disciplinary infractions, truancy, theft, depression, and substance abuse, were not primarily educational, he had the ability to perform well in a regular school setting.

Noting that a student from Ohio with attention deficit hyperactivity disorder, oppositional defiant disorder, and dysthymia, made significant educational progress in a residential facility, the Sixth Circuit ruled that such a placement was warranted.[103] The court agreed that the evidence showed that the frequency of the student's inappropriate behavior significantly decreased and his grades improved dramatically after he was placed in the residential facility.

Extended School Year

The federal trial court in New Hampshire explained that a student with a learning disability who also had a history of attentional and behavioral problems did not require an extended school year program.[104] The court posited that the parents failed to show that not having a summer program would have negated the benefits of the student's standard school year program.

Related Services

The IDEA requires school boards to provide related, or supportive, services to students with disabilities if they are needed to assist children in benefiting from their special education programs.[105] The IDEA specifically mentions transportation and such developmental, supportive, and corrective services as speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, counseling services (including rehabilitation counseling), orientation and mobility services, medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[106] The Supreme Court found in *Irving Independent School District v. Tatro* that related services need be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be incorporated into the IEP.[107] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes.

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[101] Gonzalez v. P.R. Dep't of Educ., 254 F.3d 350 [155 Educ. L. Rep. 20] (1st Cir. 2001).

[102] Dale M. *ex rel.* Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 [150 Educ. L. Rep. 372] (7th Cir. 2001).

[103] Knable v. Bexley City Sch. Dist., 238 F.3d 755 [150 Educ. L. Rep. 628] (6th Cir. 2001).

[104] [illegible]W. *ex rel.* K.W. v. Contoocook Valley Sch. Dist., 154 F. Supp.2d 217 [156 Educ. L. Rep. 2[illegible]4] (D.N.H. 2001).

[105] 20 U.S.C. § 1401(a)(22).

The Seventh Circuit wrote that it stretches the IDEA too far to classify confinement as a related service.[108] The court maintained that a school board in Illinois did not have to provide a residential program whose only attribute over the recommended placement was that it provided confinement.

A federal trial court in Ohio issued a preliminary injunction ordering a school board to include participation in interscholastic athletics on a student's IEP.[109] The court did so after discovering that the student's past participation in sports resulted in academic, physical, and personal progress.

The federal trial court in Hawaii decreed that a student's hospital stay, which eventually led to her identification as being emotionally impaired and eligible for services under the IDEA, was an integral part of the evaluation and diagnosis of the student.[110] Even though the hospitalization was also in response to a medical crisis, the court ascertained that the costs of the evaluative and diagnostic work were recoverable.

Discipline

When the IDEA was first enacted, it did not have provisions specifically referring to discipline; however, disciplinary sanctions as applied to students with disabilities were frequently the source of litigation. In the past, courts pointed out that the IDEA's change in placement and status quo provisions were applicable to the disciplinary process. In *Honig v. Doe*,[111] the Supreme Court held that special education students cannot be expelled for disciplinary reasons where the misconduct is a manifestation of the disability.

When Congress amended the IDEA in 1997, it included specific provisions dealing with discipline for the first time.[112] These provisions codified some of the prior case law and helped to clarify existing gray areas. One of the new provisions allows school administrators to transfer a student to an interim alternative setting for up to forty-five days for possession of weapons or drugs.[113] The 1997 amendments also made it clear that educational services must continue during an expulsion period.[114]

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[106] *Id.*

[107] 468 U.S. 883 [18 Educ. L. Rep. 138] (1984).

[108] Dale M. *ex rel.* Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 [150 Educ. L. Rep. 372] (7th Cir. 2001).

[109] Kling v. Mentor Pub. Sch. Dist., 136 F. Supp.2d 744 [153 Educ. L. Rep. 105] (N.D. Ohio 2001).

[110] Department of Educ., Haw. v. Cari Rae S., 158 F. Supp.2d 1190 [156 Educ. L. Rep. 924] (D. Haw. 2001).

[111] 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).

[112] 20 U.S.C. § 1415(k).

Neither *Honig v. Doe* nor the current language of the IDEA leaves school officials without recourse since special education students may be temporarily suspended and are subject to other normal disciplinary sanctions. If necessary, a school board may seek a hearing or judicial intervention pending completion of administrative due process hearings if it can show that a student is dangerous and educators cannot reach an agreement with the child's parents concerning a proper placement. *Honig* and the IDEA also allow school authorities to apply normal disciplinary sanctions to students with disabilities, such as suspensions of ten days or less, that do not result in a change in placement.

Where parents failed to respond to several attempts by an administrator to schedule a manifestation hearing, the federal trial court in Maine asserted that a delay in conducting one was of no consequence.[115] Even though the hearing took place two days beyond the ten-day limit, the court contended that the parents had the opportunity to participate and the delay did not affect its outcome. In agreeing with the IEP team's perception that the student's misconduct (selling marijuana in school) was not a manifestation of his learning disability, the court reasoned that he understood school rules and saw no evidence that his behavior was impulsive.

Remedies

If a school board fails to provide an appropriate placement for a student with a disability, a court is empowered to grant such relief as it deems appropriate.[116] The relief often involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. In *Burlington School Committee v. Department of Education, Commonwealth of Massachusetts*,[117] the Supreme Court indicated that a school board may be required to reimburse parents for costs incurred in providing their child with special education and related services if they prevail in having their chosen placement deemed appropriate. In *Florence County School District Four v. Carter*,[118] the Court ruled that reimbursement is allowed even if the facility chosen by parents is not state approved, as long as it offers an otherwise appropriate education. An amendment to the IDEA codified these holdings; even so, a reimbursement award may be limited if a parent does not provide a board with prior notice of dissatisfaction with a placement and of the intent to enroll a child in a private school.[119]

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[113] 20 U.S.C. § 1415(k)(1).

[114] 20 U.S.C. § 1412(a)(1)(A).

[115] Farrin v. Me. Sch. Admin. Dist. No. 59, 165 F. Supp.2d 37 [157 Educ. L. Rep. 709] (D. Me. 2001).

[116] 20 U.S.C. § 1415(i)(2)(A).

[117] 471 U.S. 359 [23 Educ. L. Rep. 1189] (1985).

[118] 114 S. Ct. 361 [86 Educ. L. Rep. 41] (1993).

In 1986 Congress passed the Handicapped Children's Protection Act to allow parents who prevail in a suit pursuant to the IDEA to recover their legal expenses.[120] This amendment was enacted in response to the Supreme Court's edict in *Smith v. Robinson*[121] that the original IDEA did not allow parents who prevail to recover attorney fees.

The IDEA is not the exclusive avenue through which parents may enforce the rights of their children. The IDEA specifically stipulates that none of its provisions can be interpreted to restrict or limit the rights, procedures, and remedies available under the Constitution, section 504, or other federal laws protecting students with disabilities.[122] Suits frequently are filed under section 504, the ADA, and Section 1983 of the Civil Rights Act of 1871[123] in addition to the IDEA. Section 504 and ADA suits are discussed in a later section of this chapter. Claims seeking remedies under section 1983, the Constitution, or other federal laws are discussed in this section.

Tuition Reimbursement

The Sixth Circuit awarded tuition reimbursement to parents in Ohio who unilaterally enrolled their son in a psychiatrically oriented residential facility in deciding that it was the appropriate placement for the child.[124] The panel remanded the dispute to a trial court over the amount of the award. Similarly, the federal trial court in Hawaii ordered a school board to reimburse parents for that portion of psychiatric hospitalization costs involving an evaluation of a student which led to her being identified as disabled and in need of special education.[125]

A state court in Tennessee awarded tuition reimbursement on the ground that a school board's proposed program was lacking and none of these problems existed in the private school chosen by the parents.[126] Similarly, a state court in Pennsylvania awarded reimbursement for the costs of a home-based

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[119] 20 U.S.C. § 1412(a)(10)(C)(ii).

[120] 20 U.S.C. § 1415(i)(3)(B) *et seq.*

[121] 468 U.S. 992 [18 Educ. L. Rep. 148] (1984).

[122] 20 U.S.C. § 1415(l).

[123] 42 U.S.C. § 1983.

[124] Knable v. Bexley City Sch. Dist., 238 F.3d 755 [150 Educ. L. Rep. 628] (6th Cir. 2001).

[125] Department of Educ., Haw. v. Cari Rae S., 158 F. Supp.2d 1190 [156 Educ. L. Rep. 924] (D. Haw. 2001).

[126] Wilson County Sch. Sys. v. Clifton, 41 S.W.3d 645 [153 Educ. L. Rep. 433] (Tenn. Ct. App. 2000).

Lovaas program since the county had not presented evidence showing that the child made meaningful progress under its individualized family service program.[127]

The federal trial court in Maryland found that tuition reimbursement for a parentally chosen private school was warranted for the 1998-1999 school year, but not for the 1999-2000 academic year.[128] The court reached this result since the school board failed to have an IEP in place at the start of the 1998-1999 school year but had corrected this deficiency by the time the next school year commenced. The court deemed the IEP for the second year, which called for placement in a school-based special education program, appropriate. On the other hand, a federal trial court in New York awarded tuition reimbursement for a two-year period in agreeing that a private school was a student's pendant placement.[129] The court added that the parents were entitled to have the tuition paid by the school board until such time as the placement was changed either by agreement of the parties or an administrative decision.

In another dispute from New York, a federal trial court concluded that a parent, who requested an evaluation but informed school officials that he was enrolling his child in a private school, was entitled to tuition reimbursement.[130] After the parent rejected a draft IEP, the school board never prepared a complete IEP. The court remarked that while the parent clearly did not want the services offered by school officials, there was no evidence that any other options were ever presented or discussed.

When the school board for the district within which a father resided refused to provide special education services for his son, who lived with his mother in another district, the father enrolled him in a private school and sought tuition reimbursement.[131] The trial court for the District of Columbia noted that reimbursement was not warranted because the board was not required to provide special education to a nonresident student.

A federal trial court in Wisconsin was of the opinion that reimbursement for a residential placement was not appropriate where school personnel hesitated to conduct an evaluation in the face of parental resistance.[132] Ironically, the parent had claimed that the school board failed to provide an appropriate education after she had declined several requests to allow school personnel to conduct an evaluation.

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[127] de Mora v. Dep't of Pub. Welfare, 768 A.2d 904 [151 Educ. L. Rep. 976] (Pa. Commw. Ct. 2001).

[128] Justin G. v. Bd. of Educ. of Montgomery County, 148 F. Supp.2d 576 [155 Educ. L. Rep. 346] (D. Md. 2001).

[129] Board of Educ. of the Pine Plains Cent. Sch. Dist. v. Engwiller, 170 F. Supp.2d 410 [158 Educ. L. Rep. 670] (S.D.N.Y. 2001).

[130] Wolfe v. Taconic-Hills Cent. Sch. Dist., 167 F. Supp.2d 530 [158 Educ. L. Rep. 271] (N.D.N.Y. 2001).

[131] Pestronk v. District of Columbia, 150 F. Supp.2d 147 [155 Educ. L. Rep. 498] (D.D.C. 2001).

[132] Suzawith v. Green Bay Area Sch. Dist., 132 F. Supp.2d 718 [151 Educ. L. Rep. 886] (E.D. Wis. 2000).

Compensatory Services

An appellate court in Connecticut made an award of compensatory educational services to a student with disabilities who was incarcerated.[133] The student, who was placed in restrictive housing, was not allowed to attend classes during that time. The court judged that the department of education failed to follow the IDEA's procedural requirements and had not offered a program that would have provided an educational benefit to the student.

Attorney Fees and Costs

Parents are awarded reimbursement of attorney fees where the courts are satisfied that they are the prevailing party. A state court in Tennessee mandated that parents who obtained an order directing a school board to reimburse them for past educational expenses were the prevailing party entitled to attorney fees.[134] In like manner, a federal trial court in New York explained that a parent, who prevailed by obtaining both a declaration that her procedural rights under the IDEA were violated and an order directing the state to provide her with a hearing decision, was entitled to attorney fees.[135]

The federal trial court in New Jersey awarded attorney fees to parents who obtained everything they wanted through a settlement agreement that was executed following two days of hearings.[136] The court was convinced that a causal relationship existed between the administrative proceedings and the relief the parents obtained. Conversely, a federal trial court in New York denied reimbursement for fees charged by a consultant retained by parents who eventually reached a settlement agreement with a school board.[137] The court ascertained that private settlement agreements do not confer prevailing party status. Likewise, the Seventh Circuit refused to award attorney fees to parents from Wisconsin who reached an agreement through mediation after requesting a due process hearing, in believing that the board likely would have made changes to the student's IEP at the parents' request.[138] Further, a federal trial court in Illinois denied fees to parents in acknowledging that a hearing officer's order gave their child the very same services that the school board offered in a settlement agreement.[139]

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[133] Unified Sch. Dist. No. 1 v. Conn. Dep't of Educ., 780 A.2d 154 [157 Educ. L. Rep. 237] (Conn. App. Ct. 2001).

[134] Wilson County Sch. Sys. v. Clifton, 41 S.W.3d 645 [153 Educ. L. Rep. 433] (Tenn. Ct. App. 2000).

[135] Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp.2d 236 (S.D.N.Y. 2000).

[136] P.G. v. Brick Township Bd. of Educ., 124 F. Supp.2d 251 [150 Educ. L. Rep. 96] (D.N.J. 2000).

[137] J.S. v. Ramapo Cent. Sch. Dist., 165 F. Supp.2d 570 [157 Educ. L. Rep. 728] (S.D.N.Y. 2001).

[138] Edie F. *ex rel.* Casey F. v. River Falls Sch. Dist., 243 F.3d 329 [151 Educ. L. Rep. 796] (7th Cir. 2001).

[139] Joshua H. *ex rel.* Mr. H. v. Lansing Pub. Schs. Dist. No. 158, 161 F. Supp.2d 888 [157 Educ. L. Rep. 71] (N.D. Ill. 2001).

In Hawaii, the federal trial court awarded attorney fees to a parent who was granted three months of compensatory educational services for her daughter even though she had not obtained all of the relief that she sought.[140] On the other hand, a federal trial court in Pennsylvania adjusted a fee award to reflect the parents' limited success.[141] Similarly, in Connecticut, the federal trial court granted a partial fee award on the ground that a suit influenced, but did not dictate, a change in regulations addressing the issues raised in the case.[142]

Plaintiffs in the District of Columbia filed a class action suit under section 1983 to enforce their rights under the IDEA.[143] The federal trial court commented that insofar as the claims of members of the class were brought under section 1983 instead of the IDEA, the statutory cap on the amount of attorney fees that can be paid by the school board did not apply.

In a case from Pennsylvania, the Third Circuit affirmed that an attorney-parent could not recover fees for work representing his minor child in proceedings under the IDEA.[144] The court reasoned that the purpose of the IDEA's fee-shifting provision was to encourage the effective prosecution of meritorious claims and that it would be best to encourage parents to seek independent, emotionally detached counsel for their children.

The Eighth Circuit affirmed an award of attorney fees against the Iowa Department of Education on the basis that it was justified because of the agency's zealous opposition to the parents' position.[145] However, the panel was of the view that the lower court abused its discretion in awarding fees against the department, which were incurred during due process hearings, because the state was not part of those proceedings.

In a case where a school board prevailed, a federal trial court in Alabama awarded it reimbursement for the costs of copying documents for opposing counsel and the court.[146] At the same time, the court refused to reimburse the board for the costs of copies it kept for its own records.

The federal trial court in Massachusetts allowed the payment of expert witness fees to be reimbursed to prevailing parents.[147] The court posited that reimbursing parents for such costs was the only way to accomplish the legislative purpose of making a prevailing party whole.

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[140] Department of Educ., Haw. v. Rodarte, 127 F. Supp.2d 1103 [150 Educ. L. Rep. 718] (D. Haw. 2000).

[141] Murphy v. Girard Sch. Dist., 134 F. Supp.2d 431 [152 Educ. L. Rep. 615] (W.D. Pa. 1999).

[142] E.S. *ex rel.* Mr. S. v. Ashford Bd. of Educ., 134 F. Supp.2d 462 [152 Educ. L. Rep. 625] (D. Conn. 2001).

[143] Blackman v. District of Columbia, 145 F. Supp.2d 47 [155 Educ. L. Rep. 227] (D.D.C. 2001), 150 F. Supp.2d 133 [155 Educ. L. Rep. 494] (D.D.C. 2001).

[144] Woodside v. Sch. Dist. of Phila. Bd. of Educ., 248 F.3d 129 [153 Educ. L. Rep. 525] (3d Cir. 2001).

[145] John T. v. Iowa Dep't of Educ., 258 F.3d 860 [155 Educ. L. Rep. 1077] (8th Cir. 2001).

[146] Maricus W. v. Lanett City Bd. of Educ., 142 F. Supp.2d 1327 [154 Educ. L. Rep. 841] (M.D. Ala. 2001).

[147] Pazik v. Gateway Reg. Sch. Dist., 130 F. Supp.2d 217 [151 Educ. L. Rep. 455] (D. Mass. 2001).

Section 1983

Plaintiffs frequently file suits under section 1983 to enforce their rights under the IDEA. The federal trial court for the District of Columbia established a four-part test for establishing whether compensatory damages are warranted under section 1983.[148] The court held that plaintiffs must prove by a preponderance of the evidence that a school board violated one or more specific provisions of the IDEA; that exceptional circumstances existed, such that the conduct of school authorities that caused the IDEA violations was persistently egregious and prevented or frustrated the student from securing equitable relief under the IDEA; that the board had a custom or practice as the moving force behind the alleged IDEA violations; and that the IDEA's normal remedies are inadequate to compensate for the alleged harm. Insofar as the plaintiffs failed to satisfy the second prong of this test, the court denied their request for damages.

A federal trial court in California decreed the legislative history of section 1415 of the IDEA makes it clear that parents can recover damages under section 1983 for violations of the IDEA.[149] Similarly, the federal trial court in Connecticut indicated that Congress expressly allowed parents to maintain section 1983 actions.[150]

In the first of three cases from New York, a federal trial court determined that the applicable statute of limitations for a section 1983 claim was the three-year period set for personal injury actions.[151] The court added that the plaintiffs could not avoid the IDEA exhaustion of administrative remedies requirement by filing suit under section 1983 when their claims were directly related to the appropriateness of students' educational placements, charges that are normally filed pursuant to the IDEA.

When parents sought tort-like damages under section 1983 for use of excessive force by a teacher, a federal trial court in New York denied a school board's motion for summary judgment.[152] According to the court, the parents of a child with autism presented evidence that the force used by their child's teacher was disproportionate to the need and that school officials took no action despite being aware of the problem.

A federal trial court in New York observed that state departments of education are immune from suits under section 1983.[153] The court stated that this is a long-settled issue.

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[148] Walker v. District of Columbia, 157 F. Supp.2d 11 [156 Educ. L. Rep. 602] (D.D.C. 2001).

[149] Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp.2d 1287 [158 Educ. L. Rep. 254] (C.D. Cal. 2001).

[150] Mr. and Mrs. H. *ex rel.* M.H. v. Bristol Bd. of Educ., 169 F. Supp.2d 21 [158 Educ. L. Rep. 597] (D. Conn. 2001).

[151] B.D. v. DeBuono, 130 F. Supp.2d 401 [151 Educ. L. Rep. 461] (S.D.N.Y. 2000).

[152] Dockery v. Barnett, 167 F. Supp.2d 597 [158 Educ. L. Rep. 278] (S.D.N.Y. 2001).

[153] Board of Educ. of the Pine Plains Cent. Sch. Dist. v. Engwiller, 170 F. Supp.2d 410 [158 Educ. L. Rep. 670] (S.D.N.Y. 2001).

In another chapter in a long-standing dispute from Minnesota where plaintiffs succeeded in having a paraprofessional assigned to a student in a parochial school, the federal trial court awarded attorney fees under section 1988.[154] Although the IDEA independently authorizes an award of attorney fees to prevailing parents, the court was satisfied that section 1988, which allows for recovery of attorney fees in section 1983 actions, was an appropriate vehicle to obtain fees.

Actions Under Other Statutes

A federal trial court in Texas ruled that a parent who protested a blanket-wrapping technique used by school personnel failed to allege a violation of a clearly established constitutional right under the Fourth Amendment.[155] The court noted that the student's substantive due process rights did not give her the right to be free from restraints to control her outbursts so as to prevent her from harming herself or those providing her with an education.

In Virginia, a federal trial court declared that the use of physical restraints did not violate a student's substantive due process rights.[156] The court permitted the use of physical restraint under the student's IEP when he became a danger to himself or others and its use was nothing more than a disciplinary measure within the sound discretion of his teacher.

Other IDEA Issues

In Louisiana, a federal trial court decided that an IEP for a high school student with multiple disabilities included appropriate transition services.[157] The court discovered that school personnel included a discussion of transition services in the student's reports and evaluations, embodied individualized transition plans in the IEP which detailed desired adult outcomes, school action steps, and family action steps, and contacted appropriate state and local agencies to assist in providing him with transition services. Similarly, the federal trial court in Hawaii agreed with school officials that an IEP for a student with bipolar disorder adequately addressed transition issues.[158] The court remarked that the IEP set forth goals for the student's completion of high school, becoming part of his community through a church group, learning about careers that would interest him, exploring local community colleges, and speaking with vocational counselors. The court was content that this was clearly a coordinated set of activities designed to promote movement from school to postschool activities.

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[154] Westendorp v. Indep. Sch. Dist. No. 273, 131 F. Supp.2d 1121 [151 Educ. L. Rep. 861] (D. Minn. 2000).

[155] Doe v. S. & S. Consol. Indep. Sch. Dist., 149 F. Supp.2d 274 [155 Educ. L. Rep. 370] (E.D. Tex. 2001).

[156] Brown v. Ramsey, 121 F. Supp.2d 911 [149 Educ. L. Rep. 392] (E.D. Va. 2000).

[157] Pace v. Bogalusa City Sch. Bd., 137 F. Supp.2d 711 [153 Educ. L. Rep. 175] (E.D. La. 2001).

[158] Browell v. LeMahieu, 127 F. Supp.2d 1117 [150 Educ. L. Rep. 732] (D. Haw. 2000).

Many states require students to pass standardized tests as a condition of receiving a high school diploma. An appellate court in Indiana contended that the state could require students with disabilities to pass a qualifying examination to receive a high school diploma.[159] The court was satisfied that students received adequate notice of the requirements and that they were exposed to the curriculum tested on the examination. The court further maintained that an accommodation for cognitive disabilities provided for in a student's IEP did not necessarily need to be offered during such an examination.

The IDEA places an affirmative duty on states and school boards to identify, locate, and evaluate all students with disabilities.[160] The federal trial court in Hawaii observed that the state violated this aspect of the law by not identifying a student as disabled until late in her junior year.[161] The court believed that the state had, or should have had, reason to suspect that the student was disabled as early as her freshman year.

State Laws

Special education is governed by both state and federal law. Although each state's special education statutes must be consistent with the IDEA, differences do exist. While most states have legislation similar in scope to the IDEA, several have requirements that go beyond the IDEA's provisions and set higher standards of what constitutes an appropriate education and/or stricter procedural requirements. In other instances, state laws establish procedures for implementing special education programs that are not explicitly covered by federal law. Federal and state courts are frequently called on to interpret those provisions.

Michigan

Michigan is one of the states that has established a higher standard of appropriateness than that set by the IDEA. A federal trial court concluded that even considering the state's standard that an IEP must develop a student's maximum potential, departure from the IDEA's preference for placement in the LRE was not warranted.[162] The court did not uncover any evidence that special education services, which would have enabled the student to develop her maximum potential, could not have been provided in her neighborhood school.

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[159] Rene v. Reed, 751 N.E.2d 736 [155 Educ. L. Rep. 815] (Ind. Ct. App. 2001).

[160] 20 U.S.C. § 1412(a)(3).

[161] Department of Educ., Haw. v. Cari Rae S., 158 F. Supp.2d 1190 [156 Educ. L. Rep. 924] (D. Haw. 2001).

[162] McLaughlin v. Bd. of Educ. of Holt Pub. Schs., 133 F. Supp.2d 994 [152 Educ. L. Rep. 571] (W.D. Mich. 2001).

New Jersey

An appellate court in New Jersey was called upon to answer which of two school boards was responsible for the special education of a child whose parents were divorced, had joint legal custody, shared physical custody, and lived in different school districts. In a Solomon-like action, the court equally proportioned the costs between the two school boards.[163]

Another appellate court found that several regulations promulgated by the New Jersey Department of Education did not comply with federal mandates.[164] Specifically, the court pointed out that regulations governing the following were not in compliance: provision to parents of evaluation reports, tests, materials, and other documentation of eligibility; assessment of special education students to determine appropriate postsecondary outcomes; potential pool of community rehabilitation programs for secondary-level students; application of disciplinary procedural safeguards to certain potentially disabled students; dissemination of procedural safeguards statements; eligibility for consideration as a surrogate parent for a child with a disability; child find procedures; and documentation of dissenting opinions of IEP team members.

An appellate court in New Jersey was of the opinion that a student who was being homeschooled was entitled to receive speech therapy services from the school board under state regulations.[165] The court wrote that since the school board provided this service to students from nonpublic schools, there was no rational basis to treat children who were homeschooled differently.

Pennsylvania

A federal trial court in Pennsylvania dismissed state claims in a suit for monetary damages that was filed under various federal and state statutes.[166] The court did so because it could not uncover any provision in state regulations that would have permitted a private cause of action for monetary damages.

Discrimination Under the Rehabilitation Act, Section 504

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability … shall, solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance…."[167] Section 504 effectively prohibits any recipient of federal funds, including schools, from discriminating against individuals with disabilities in the provision of services or employment.

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[163] Somerville Bd. of Educ. v. Manville Bd. of Educ., 752 A.2d 793 [144 Educ. L. Rep. 1007] (N.J. App. Div. 2000).

[164] Baer v. Klagholz, 771 A.2d 603 [153 Educ. L. Rep. 898] (N.J. App. Div. 2001).

[165] Forstrom v. Byrne, 775 A.2d 65 [155 Educ. L. Rep. 608] (N.J. App. Div. 2001).

[166] Whipple *ex rel.* Whipple v. Warren County Sch. Dist., 133 F. Supp.2d 381 [152 Educ. L. Rep. 129] (W.D. Pa. 2000).

A person is considered to have a disability under section 504 if he or she has a physical or mental impairment that substantially limits one or more of life's major life activities, has a record of such an impairment, or is regarded as having such an impairment.[168] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[169]

In both *School Board of Nassau County v. Arline*[170] and *Southeastern Community College v. Davis*,[171] the Supreme Court held that a person is otherwise qualified for purposes of section 504 if he or she is capable of meeting all of a program's requirements in spite of the disability. If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for the person's disabilities unless doing so would create an undue hardship.[172]

Students

Elementary and Secondary

Insofar as students with disabilities at the elementary and secondary level have rights under section 504 and the IDEA, they and their parents file suits alleging claims under both statutes. Frequently, the claims advanced under one statute are identical or similar to those under the other; however, as reflected in this section, sometimes distinct claims are brought under section 504.

The Second Circuit ruled that a student in Vermont who was denied admission to an independent school attended by others whose tuition was paid with public funds did not make out a prima facie claim under section 504 because he was not qualified for mainstream classes.[173] The court explained that the school required students to demonstrate a fifth-grade achievement level to be accepted into its high school mainstream program. The court was of the view that since the student's inability to perform at this level meant that he could not satisfy all of the school's requirements, nothing in section 504 required it to lower its standards.

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[167] 29 U.S.C. § 794.

[168] 29 U.S.C. § 706(7)(B).

[169] 34 C.F.R. § 104.3(j)(2)(ii).

[170] 480 U.S. 273 [37 Educ. L. Rep. 448] (1987).

[171] 442 U.S. 397 (1979).

[172] 34 C.F.R. § 104.12(a).

[173] St. Johnsbury Acad. v. D.H., 240 F.3d 163 [151 Educ. L. Rep. 74] (2d Cir. 2001).

In a case from Nebraska, the Eighth Circuit affirmed that a school board did not violate either section 504 or the IDEA.[174] The court agreed that the parents of a child who was dismissed from a special education program did not present any evidence that their daughter had a physical or mental impairment that substantially limited her major life activity of learning.

The federal trial court for the District of Columbia rejected the section 504 claim of a guardian and student even though it agreed with them that the school board violated the IDEA by failing to provide the child with timely IEPs.[175] The court reasoned that the plaintiffs failed to prove that the board discriminated against the student or that it did any more than fail to provide him with a free appropriate public education. The court commented that the plaintiffs failed to demonstrate that the conduct of school officials constituted bad faith or gross misjudgment.

A federal trial court in Illinois denied a student-athlete's request for an order allowing him to resume participation in sports after he was suspended for misconduct.[176] The court posited that waiving the code of conduct would have been unreasonable as it would have sent the message to others that a challenge in federal court could thwart the enforcement of rules.

Higher Education

The Fourth Circuit affirmed that a student in North Carolina with a multiple personality disorder who was removed from a teacher certification program for exhibiting inappropriate and aggressive behavior toward her professors was not disabled within the meaning of section 504 or the ADA.[177] The court agreed with evidence demonstrating that the student was perceived as being unable to perform a single job but not a class of jobs.

A federal trial court in Pennsylvania indicated that a student-athlete with a learning disability who was denied full-qualifier status because she failed to meet minimum requirements for SAT scores and grade point averages was not discriminated against due to her disability.[178] The court acknowledged that the student was granted partial-qualifier status which allowed her to retain her scholarship, practice with the team, and compete for four years. Even though the student could not compete during her freshman year, the court was convinced that she had not suffered an injury.

In a case from Massachusetts, the federal trial court asserted that a student who failed two courses and received an unsatisfactory grade in another was not otherwise qualified to remain in a M.D./Ph.D. program.[179] The court decreed that the facts revealed that the student was not capable of satisfying all of the academic standards required for participation in, and completion of, the joint degree program.

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[174] Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 [157 Educ. L. Rep. 520] (8th Cir. 2001).

[175] Walker v. District of Columbia, 157 F. Supp.2d 11 [156 Educ. L. Rep. 602] (D.D.C. 2001).

[176] Long v. Bd. of Educ., Dist. 128, 167 F. Supp.2d 988 [158 Educ. L. Rep. 301] (N.D. Ill. 2001).

[177] Davis v. Univ. of N.C., 263 F.3d 95 [156 Educ. L. Rep. 759] (4th Cir. 2001).

[178] Pryor v. NCAA, 153 F. Supp.2d 710 [156 Educ. L. Rep. 185] (E.D. Pa. 2001).

[179] el Kouni v. Trs. of Boston Univ., 169 F. Supp.2d 1 [158 Educ. L. Rep. 592] (D. Mass. 2001).

Other Section 504 Issues

A federal trial court in New York declared that the parent of a student with disabilities was required to exhaust administrative remedies under the IDEA before filing suit under section 504 or the ADA.[180] The court determined that since the substance of the parent's challenge questioned the adequacy of the student's IEP, the IDEA's hearing process could have produced the very relief he sought.

In Oregon, the federal trial court dismissed a case in ascertaining that parental charges were associational discrimination claims and that they had not alleged any separate and distinct denial of services to themselves apart from their role as parents of schoolchildren.[181] The parents claimed that the school board refused to provide their independent experts with the same access to special education classes that it allowed in regular education classes.

The federal trial court in Hawaii, in deciding that Congress clearly stated its intent to abrogate sovereign immunity under section 504 and title II of the ADA, ruled that damages were available under section 504.[182] However, the court contended that there were genuine issues of material fact as to whether the state acted with deliberate indifference such as to support the parents' claim for damages. Similarly, the federal trial court in Colorado found that section 504 and the ADA abrogated the states' Eleventh Amendment immunity.[183] Conversely, in New York, a federal trial court remarked that since colleges in the state system are arms of the state for Eleventh Amendment purposes, they are immune from suit.[184]

In another chapter in a long-standing dispute involving athletic eligibility under section 504 and the ADA, the federal trial court in New Jersey observed that a student no longer had standing to seek injunctive relief because a change in the NCAA's eligibility rules gave him a fourth year of eligibility.[185] The court noted that the student's inability to gain a fourth year of eligibility had been its sole reason for previously granting standing.

As reflected by a case from New York, since section 504 does not have its own statute of limitations, one must be borrowed from analogous state law. A federal trial court offered that the applicable statute of limitations for filing a section 504 claim is the state's three-year period for personal injury actions.[186]

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[180] Kielbus v. N.Y. City Bd. of Educ., 140 F. Supp.2d 284 [15[illegible] Educ. L. Rep. 175] (E.D.N.Y. 2001).

[181] Glass v. Hillsboro Sch. Dist. 1J, 142 F. Supp.2d 1286 [154 Educ. L. Rep. 833] (D. Or. 2001).

[182] Patricia N. v. LeMahieu, 141 F. Supp.2d 1243 [154 Educ. L. Rep. 532] (D. Haw. 2001). *See also* Patrick W. v. LeMahieu, 165 F. Supp.2d 1144 [157 Educ. L. Rep. 742] (D. Haw. 2001).

[183] Werner v. Colo. State Univ., 135 F. Supp.2d 1137 [152 Educ. L. Rep. 712] (D. Colo. 2000).

[184] Hamilton v. City Coll. of the City Univ. of N.Y., 173 F. Supp.2d 181 [159 Educ. L. Rep. 610] (S.D.N.Y. 2001).

[185] Bowers v. NCAA, 130 F. Supp.2d 610 [151 Educ. L. Rep. 501] (D.N.J. 2001).

Americans with Disabilities Act

The Americans with Disabilities Act (ADA)[187] is designed to prohibit discrimination against persons with disabilities in a wide range of activities sponsored by private as well as public entities. The ADA's greatest impact is on the private sector; even so, since many of its provisions apply to public entities and are similar in scope to those of section 504, suits filed under the ADA should interest consumers of education law. Generally, obedience to section 504 results in compliance with the ADA; however, several provisions of the ADA addressed loopholes in section 504 and codified judicial interpretations of the Rehabilitation Act. Many actions arising in the public sector are now brought on the basis of the ADA as well as section 504. In most of these disputes, the disposition is identical under both laws. Cases that were discussed in the section 504 part of this chapter that reached the same result as actions brought pursuant to the ADA are not repeated in this section.[188]

Students

Elementary and Secondary

In light of other waivers routinely considered by an athletic association, a federal trial court in Pennsylvania issued an injunction requiring the group to consider a waiver process for its age limitation rule.[189] The court held that creating such a waiver process would not have placed an undue burden on the association.

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[186] B.D. v. DeBuono, 130 F. Supp.2d 401 [151 Educ. L. Rep. 461] (S.D.N.Y. 2000).

[187] 42 U.S.C. § 12101 *et seq.*

[188] Bowers v. NCAA, 130 F. Supp.2d 610 [151 Educ. L. Rep. 501] (D.N.J. 2001); Werner v. Colo. State Univ., 135 F. Supp.2d 1137 [152 Educ. L. Rep. 712] (D. Colo. 2000); Kielbus v. N.Y. City Bd. of Educ., 140 F. Supp.2d 284 [154 Educ. L. Rep. 175] (E.D.N.Y. 2001); Patricia N. v. LeMahieu, 141 F. Supp.2d 1243 [154 Educ. L. Rep. 532] (D. Haw. 2001); Glass v. Hillsboro Sch. Dist. 1J, 142 F. Supp.2d 1286 [154 Educ. L. Rep. 833] (D. Or. 2001); Pryor v. NCAA, 153 F. Supp.2d 710 [156 Educ. L. Rep. 185] (E.D. Pa. 2001); Davis v. Univ. of N.C., 263 F.3d 95 [156 Educ. L. Rep. 759] (4th Cir. 2001); Long v. Bd. of Educ., Dist. 128, 167 F. Supp.2d 988 [158 Educ. L. Rep. 301] (N.D. Ill. 2001); Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 [157 Educ. L. Rep. 520] (8th Cir. 2001); el Kouni v. Trs. of Boston Univ., 169 F. Supp.2d 1 [158 Educ. L. Rep. 592] (D. Mass. 2001); Hamilton v. City Coll. of the City Univ. of N.Y., 173 F. Supp.2d 181 [159 Educ. L. Rep. 610] (S.D.N.Y. 2001).

[189] Cruz v. Pa. Interscholastic Athletic Ass'n, 157 F. Supp.2d 485 [156 Educ. L. Rep. 633] (E.D. Pa. 2001).

Higher Education

A federal trial court in Illinois rejected a fourth-year medical student's request for an injunction after the medical examiners board denied his sought-after testing accommodations.[190] The court pointed out that the student failed to prove that his dyslexia would significantly limit his ability to pass the examinations without the accommodations.

Other ADA Issues

Title III of the ADA does not apply to religious organizations or entities controlled by religious organizations. The federal trial court in Colorado reasoned that since a seminary is a pervasively religious organization that provides a graduate education program founded on Biblical teachings, it was exempt from title III of the ADA.[191]

According to the federal trial court there, for purposes of the Eleventh Amendment, Puerto Rico is a state.[192] The court added that as an instrument of the Commonwealth of Puerto Rico, the University of Puerto Rico was protected from suits in federal courts by the Eleventh Amendment. The Eleventh Amendment notwithstanding, the court also decided that equitable relief was an authorized remedy.

Conclusion

Litigation involving students with disabilities has continued unabated in 2001. The major issues of this past year are similar to those argued in recent years: procedures, placement, tuition reimbursement, and attorney fees. The question of whether section 1983 can be used to redress violations of the IDEA has come to the forefront. There is no clear cut answer as courts in different jurisdictions have reached different results.

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[190] Biank v. Nat'l Bd. of Med. Exam'rs, 130 F. Supp.2d 986 [151 Educ. L. Rep. 507] (N.D. Ill. 2000).

[191] White v. Denver Seminary, 157 F. Supp.2d 1171 [156 Educ. L. Rep. 871] (D. Colo. 2001).

[192] Vizcarrondo v. Bd. of Trs. of the Univ. of P.R., 139 F. Supp 2d 198 [153 Educ. L. Rep. 885] (D.P.R. 2001).

5

Torts

William J. Evans, Jr.

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Introduction

Tort law provides remedies to individuals for harm caused by the unreasonable conduct of others. The major categories into which tort actions can be grouped are negligence, where conduct falls below an acceptable standard of care resulting in injury; intentional torts, such as assault, battery, and defamation; and strict liability, where an injury results from the creation of an unusual hazard.

This chapter examines cases brought by or on behalf of students, school employees and, in some instances, visitors on school grounds or individuals claiming harm from others in the school setting. Tort actions resulting from interscholastic sports are discussed in Chapter 6, Sports.

Negligence

Negligence remains the most common tort committed by school personnel, as plaintiffs seek to establish a causal relationship between alleged conduct and an injury. When an injured party claims that a tort has occurred, the behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would, or should, have done in the same or similar circumstances.

Injuries

Schools are responsible for maintaining safe and healthy environments in which learning can take place. The following cases are divided into categories based on where or how an injury was sustained and when sovereign or statutory immunity was not used as the defense.

Off School Property and after School Hours

Where a middle school student was injured after being chased off school property by another pupil and hit by an automobile, he and his mother challenged a grant of summary judgment in favor of the school board. The Supreme Court of Kansas affirmed that the student could not recover for negligence absent evidence that school officials assumed a duty to render services to, protect, or supervise the student before classes began, as he was not in their custody or control.[1]

A parent whose son was assaulted by another school's students while on a zoo field trip sued a school board for negligent supervision. The federal trial court in the District of Columbia rejected the board's motion to dismiss, declaring that it owed a duty to supervise its students in order to prevent foreseeable harm.[2]

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[1] Glaser v. Emporia Unified Sch. Dist. No. 253, 21 P.3d 573 [152 Educ. L. Rep. 795] (Kan. 2001).

[2] Thomas v. City Lights Sch., 124 F. Supp.2d 707 [150 Educ. L. Rep. 169] (D.D.C. 2000).

A student was shot and killed in a parking lot after a school dance. The student's mother brought a negligence action over an alleged lack of security against a school board and the club where the dance took place. On further review of an adverse judgment against the board, an appellate court in Louisiana reversed in the board's favor on the ground that school officials lacked the requisite degree of foreseeability that would have imposed a duty on them to provide additional security in the parking lot.[3] Further, the court applied a balancing test in deciding whether the club owed a duty of care to protect its customers from the criminal acts of third parties. Insofar as it was convinced that there was only slight foreseeability and gravity of harm in the parking lot, the court affirmed that it did not have a duty to protect the student.

Allegedly attacked by peers during an overseas field trip, a student in New York sued his nonpublic high school for the injuries he sustained, even though his signed release barred such a suit. An appellate court affirmed, noting that while evidence over whether the student or his parents had signed a release was lacking, it did not clearly or unequivocally release the school from liability for negligence.[4] Even so, the court ruled that material issues of fact as to whether school officials had sufficient specific knowledge of threats to harm the student during the trip precluded granting its motion for summary judgment. The court also affirmed that school officials neither had an intent to inflict emotional harm nor did they unreasonably endanger the student's physical safety.

A school board challenged the denial of its motion for summary judgment in a case filed by a high school student who was assaulted in school after class hours by a former student. An appellate court in New York reversed in favor of the board on the ground that it was not liable absent a showing that the attack was foreseeable.[5] The court acknowledged that although there had been previous trespassing incidents by former students, none involved physical violence against students. The court added that any negligence by school officials was not the proximate cause of the student's injuries.

In Illinois, a student intern in a work-study program sought further review of the dismissal of her negligent supervision claim against a company. On further review, an appellate court reversed in favor of the student since company officials were aware of her being touched inappropriately by one of their employees and made no attempts to correct his conduct. In fact, the court found that officials even scheduled the student to work alone with the offender.[6] The court relied on the fact that since the company had a special relationship with the student, it breached its duty of protection.

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[3] Lee v. B & B Ventures, 793 So. 2d 215 [157 Educ. L. Rep. 428] (La. Ct. App. 2001).

[4] Doe v. Archbishop Stepinac High Sch., 729 N.Y.S.2d 538 [156 Educ. L. Rep. 665] (N.Y. App. Div. 2001).

[5] Nossoughi v. Ramapo Cent. Sch. Dist., 731 N.Y.S.2d 78 [157 Educ. L. Rep. 806] (N.Y. App. Div. 2001).

[6] Platson v. NSM Am., Inc., 748 N.E.2d 1278 [154 Educ. L. Rep. 625] (Ill. Ct. App. 2001).

A superintendent of schools was involved in a traffic accident while driving home from a school basketball game in a board-owned vehicle. The other motorist unsuccessfully sued him and the board, alleging that he acted willfully and wantonly in causing the accident. An appellate court in Indiana affirmed that the superintendent did not act willfully or wantonly and that the motorist's complaint failed to raise the claim that he was acting in the scope of his employment when the accident occurred.[7]

En Route to and from School

In the only case in this section where a plaintiff succeeded, a school board sought indemnification from a bus company for amounts it paid to settle claims arising from the death of a child who was struck by a school bus. An appellate court in Connecticut affirmed that the board was entitled to compensation not only because its negligence in the management and supervision of the bus company was passive but also since the company's negligence was the direct cause of the accident.[8]

In a case from Minnesota, the Eighth Circuit examined a dispute where a motorist was injured in a collision with an automobile driven by a student who was traveling between two high schools in different districts. The court affirmed a grant of summary judgment in favor of both school boards on the basis that they did not owe the motorist a duty of care since he was a member of the general public and their officials had no knowledge that the student was anything but an average licensed driver.[9]

A student in New York injured her shoulder when the school bus she was riding in struck another bus. Her parents filed a damages action and the school board challenged the denial of its motion for summary judgment. In modifying the earlier order, the court held that each party satisfied its burden with respect to the student's injury claim for the purposes of the no-fault law's threshold for tort recovery.[10] However, since the student was unable to prove that her injuries prevented her from performing her normal and customary activities for not less than 90 of the 180 days immediately following the accident, the court agreed that she was barred from further tort recovery.

The first of three cases from Louisiana involved a female high school student who sued a school board for negligence. The plaintiff was sexually assaulted while being driven home by peers, since she had not been informed that her after-school band practice was canceled. In affirming a grant of summary judgment in favor of the board, an appellate court focused on the board's duty of protection and concluded that while it was unclear whether the student's lack of awareness of the cancellation was her fault or that of school officials, its judgment for the board did not turn on that issue.[11] Rather, the court asserted that even if school officials breached their duty by not providing supervision, since the student willingly accepted a ride from a driver she knew, they had no control or authority over what happened off school grounds.

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[7] Miner v. Southwest Sch. Corp., 755 N.E.2d 1110 [157 Educ. L. Rep. 305] (Ind. Ct. App. 2001).

[8] City of Bristol v. Dickau Bus Co., 779 A.2d 152 [156 Educ. L. Rep. 1161] (Conn. Ct. App. 2001).

[9] Gylten v. Swalboski, 246 F.3d 1139 [153 Educ. L. Rep. 35] (8th Cir. 2001).

[10] Jones v. Norwich City Sch. Dist., 725 N.Y.S.2d 131 [154 Educ. L. Rep. 258] (N.Y. App. Div. 2001).

In Louisiana, a child was struck and injured by an automobile while attempting to cross a highway to get on her bus. Her mother challenged a grant of summary judgment in favor of the school board. An appellate court affirmed that the common carrier doctrine did not apply since the child was not boarding, traveling on, or disembarking from the bus at the time of the accident and it was not even in sight or close proximity when she crossed the highway.[12] The court reasoned that the bus driver's failure to wait for the child to leave her home did not expand the protected zone of passage.

A school board sought further review of the denial of its motion that there was no cause of action in a suit filed by the widow of a pedestrian. The plaintiff's husband died of injuries he sustained when struck by a bicycle that a high school coach was riding to school so that he could view game films on a Sunday. An appellate court in Louisiana reversed in favor of the board in explaining that there was no suggestion that the coach was performing any type of service to the school district while en route to the school.[13]

Parents of a seven-year-old child who was struck and killed while waiting for a school bus challenged a grant of summary judgment in favor of the school board and various officials. An appellate court in Georgia affirmed as to the board on the ground of sovereign immunity since it had not waived this defense by purchasing liability insurance to cover damages arising out of the ownership or operation of a school bus.[14] The court affirmed as to the transportation director since his actions relating to the supervision, control, and monitoring of student safety were discretionary.

School Settings during School Hours

The first seven of the reported thirteen cases in this section are from New York. A school board challenged the denial of its motion for summary judgment in a personal injury claim filed on behalf of a student who was hurt when peers struck and shattered a glass window panel. An appellate court reversed in favor of the board, declaring that it was not liable for the spontaneous acts of students.[15] The court rejected the student's claim that a teacher's testimony, that every so often a child would bang on the window, established sufficiently specific knowledge or notice by the board that this conduct would result in the splintering of the window. The court observed that school personnel could not reasonably be expected to guard against all of the sudden, spontaneous acts of students.

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[11] Frederick v. Vermilion Parish Sch. Bd., 772 So. 2d 208 [149 Educ. L. Rep. 943] (La. Ct. App. 2000).

[12] Amos v. St. Martin Parish Sch. Bd., 773 So. 2d 300 [150 Educ. L. Rep. 303] (La. Ct. App. 2000).

[13] Fasullo v. Finley, 782 So. 2d. 76 [152 Educ. L. Rep. 895] (La. Ct. App. 2001).

[14] Brock v. Sumter County Sch. Bd., 542 S.E.2d 547 [152 Educ. L. Rep. 316] (Ga. Ct. App. 2000).

[15] Mitsel v. N.Y. City Bd. of Educ., 717 N.Y.S.2d 341 [149 Educ. L. Rep. 870] (N.Y. App. Div. 2000).

An appellate court in New York affirmed that a school board was not liable for injuries suffered by a high school student as a result of an altercation in a hallway.[16] The court agreed that the board was not liable for negligent supervision of students, especially since the plaintiff and his fellow student knew each other for several years; had not previously had a verbal or physical dispute with each other or any other student; and the brief, unanticipated altercation occurred spontaneously during a chance meeting between classes.

A first-grade student was injured when he tripped on a crack in the sidewalk used as a recess play area, and the school challenged the denial of its motion for summary judgment. An appellate court in New York reversed in favor of the school in writing that it exercised the same degree of care and supervision as a reasonably prudent parent.[17]

An appellate court in New York ordered a new trial in a case where a student injured his hand and wrist while attempting to open a classroom window. The court decreed that while a teacher was negligent in allowing the student to open the window without the use of a window pole, the jury instructions were erroneous.[18] The court pointed out that erroneous instructions allowed the jury to assume that permitting high school students to open a classroom window was negligent in contravention of the reasonably prudent person standard.

Reversing the denial of a board's motion for summary judgment, an appellate court agreed with the board that a middle school student was a willing and active participant in an incident where he was struck in the eye by a stick thrown by a friend.[19] The court was of the opinion that granting the board's motion was warranted since it sustained its burden of establishing that school officials had no actual or constructive knowledge of prior similar behavior by the students.

An appellate court in New York reinstated a jury verdict in favor of a seventh-grade student who was injured when he tripped over the leg of teacher monitoring the halls between classes.[20] The court reversed a post-trial motion to dismiss because it was satisfied that there was a prima facie case of negligent supervision since a parent of ordinary prudence would not have tried to stop the child by tripping him. At the same time, the court declared the damages awards excessive, lowering the amount for past pain and suffering from $150,000 to $85,000 and future pain and suffering from $305,000 to $165,000.

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[16] Dadich v. Syosset High Sch., 717 N.Y.S. 2d 634 [150 Educ. L. Rep. 234] (N.Y. App. Div. 2000).

[17] Santana v. City of N.Y., 722 N.Y.S.2d 545 [152 Educ. L. Rep. 237] (N.Y. App. Div. 2001).

[18] Weston v. City of N.Y., 722 N.Y.S.2d 811 [152 Educ. L. Rep. 750] (N.Y. App. Div. 2001).

[19] Janukajtis v. Fallon, 726 N.Y.S.2d 451 [154 Educ. L. Rep. 912] (N.Y. App. Div. 2001).

[20] Gonzalez v. City of N.Y., 730 N.Y.S.2d 154 [156 Educ. L. Rep. 1279] (N.Y. App. Div. 2001).

Where a sixteen-year-old student was assaulted by a classmate, an appellate court in New York reversed a grant of summary judgment in favor of a school.[21] According to the court, material issues of fact over whether a teacher was presented with a potentially dangerous situation and failed to take energetic steps to intervene precluded granting such a motion.

The parents of an eighth-grade student sought further review of the dismissal of their claim that their daughter was the victim of sexual abuse while involved in peer mediation sessions. The Supreme Court of Ohio reversed in favor of the parents on the basis that the state statute that mandates the reporting of known or suspected child abuse, through its criminal penalty for not doing so, expressly imposed liability.[22]

In the first of three cases from Louisiana, the mother of a sixth-grade student unsuccessfully sued a school board for negligence. The plaintiff's daughter suffered from seizures for several years after being pushed into a school wall by a peer. An appellate court affirmed that since any breach of duty by school officials to supervise the child was not the cause of the incident and her resulting injuries, the board was not liable.[23]

Where a seventh-grade student slipped, fell, and broke his arm on water on the floor of his school's basement, an appellate court in Louisiana affirmed but amended the damages awards.[24] The court agreed that the board was liable for the child's broken arm since there was a history of problems with water in the basement and there was no record that officials took reasonable measures against the risk of a student slipping. However, the court deleted a loss of consortium award entered on behalf of the child's parents because they failed to file their motion to amend their complaint in a timely manner.

The mother of a first-grade student unsuccessfully brought a damages action against her son's teacher, principal, and school board, alleging that the teacher continuously mistreated, harassed, and physically abused him over the course of one year. An appellate court in Louisiana affirmed the defendants' exception of prescription.[25] The court was of the view that since the alleged incidents were immediately knowable by the mother as discrete, separate events, they did not constitute a continuing tort.

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[21] Wojtowicz v. Dexter Terrace Elementary Sch., 732 N.Y.S.2d 527 [158 Educ. L. Rep. 789] (N.Y. App. Div. 2001).

[22] Campbell v. Burton, 750 N.E.2d 539 [154 Educ. L. Rep. 924] (Ohio 2001).

[23] Jackson v. Madison Parish Sch. Bd., 779 So. 2d. 59 [152 Educ. L. Rep. 425] (La. Ct. App. 2001).

[24] Green v. Orleans Parish Sch. Bd., 780 So. 2d 1082 [152 Educ. L. Rep. 845] (La. Ct. App. 2001).

[25] Woods v. St. Charles Parish Sch. Bd., 790 So. 2d 696 [156 Educ. L. Rep. 356] (La. Ct. App. 2001).

Parents challenged an adverse grant of summary judgment when they sued an archdiocese and school after their son was assaulted by a classmate. An appellate court reversed on the basis that a completely unstricken affidavit created genuine issues of material fact over whether school officials breached their duty to exercise reasonable and ordinary care that warranted remanding the case for further proceedings.[26]

In Kentucky, a student sought further review of a directed verdict in favor of the high school teacher he sued for false imprisonment, assault and battery, and outrage. The teacher claimed that he chained the student to a tree as a lighthearted prank to impress upon him the importance of staying in class and finishing his assignments. An appellate court reversed in favor of the student in positing that the teacher was not entitled to a directed verdict on the claims of false imprisonment and assault and battery for the loss of time, physical discomfort, and mental suffering inflicted on the student since they did not required proof of damages for at least a nominal award. [27] The court further indicated that there was sufficient proof that the student suffered from emotional damage to justify submitting the issue to a jury.

In School Buildings and on School Grounds

When a seven-year-old was injured while sledding during recess, an activity permissible within the restrictions imposed by school officials, his mother unsuccessfully filed a negligence action against the school board. The Supreme Court of Iowa affirmed both a jury verdict in favor of the board and the denial of the mother's motion for a new trial based on improper jury instructions over the student's assumption of risk.[28] Stating that jury instructions should be considered as a whole, not in isolation, the court remarked that the instructions neither identified nor applied the inherent risk standard to any particular facts. Instead, the appellate panel agreed that the trial court specifically told the jury to consider the standard of reasonable care pertaining to the failure to properly supervise, inspect, and remove the danger in sledding.

After a contractor was killed when the trench in which he was installing drainage pipe collapsed, his widow brought a wrongful death action against a school board, its architect, and others. The Supreme Court of New Jersey affirmed that the widow's attorney failed to establish that either the board or architect breached a duty of care by failing to supervise the contractor's company.[29] However, the court decided that the widow was entitled to attempt discovery of evidence concerning related projects involving the board and architect that possibly had a bearing on their general supervisory responsibilities. In remanding, the court relied on evidence that the board's failure to supply the correct pipe breached its contractual duty of care, a failure that was the proximate cause of the contractor's death.

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[26] McClyde v. Archdiocese of Indianapolis, 752 N.E.2d 229 [155 Educ. L. Rep. 1336] (Ind. Ct. App. 2001).

[27] Banks v. Fritsch, 39 S.W.3d 474 [152 Educ. L. Rep. 379] (Ky. Ct. App. 2001).

[28] Anderson v. Webster City Cmty. Sch., 620 N.W.2d 263 [149 Educ. L. Rep. 887] (Iowa 2000).

[29] Pfenninger v. Hunterdon Cent. Reg'l High Sch., 770 A.2d 1126 [153 Educ. L. Rep. 652] (N.J. 2001).

A woman who fell and injured herself unsuccessfully filed a negligence action against a school board and two maintenance workers. The plaintiff left her car to enter a gymnasium where her son was playing basketball and slipped on ice she had not been aware of. The Supreme Court of South Dakota reversed a grant of summary judgment that had been entered on behalf of the defendants.[30] The court ascertained that whether the woman assumed the risk of injury when she parked her car in a dark, icy playground was a question of fact for a jury in all but the rarest of cases as long as there is evidence to support the claims.

The first of three cases from New York involved a participant in a softball game on a public school field who was injured when he fell as he descended from bleachers. On further review of a jury verdict in the player's favor, over whether the school board violated a city building code which required protective guards on bleacher seating, an appellate court reversed and ordered a new trial. The panel found that the trial court erroneously judged that the board was negligent per se.[31]

Where a seven-year-old child was injured on school playground equipment, an appellate court in New York modified a grant of summary judgment in favor of a school board and equipment manufacturer. The court ruled that while there was no triable issue of fact as to whether the equipment was improperly designed, questions remained as to whether the board breached its duty by failing to instruct students on the safe use of the equipment and to warn them of the potential dangers.[32]

Victims of an automobile accident sued the driver of the second vehicle and the school board whose property the driver was exiting at the time. An appellate court in New York reinstated the case against the board on the basis that a row of buses lined up outside of the school's driveway obstructed the defendant's view of approaching traffic.[33]

Negligence Defenses

School boards, administrators, and/or teachers who are involved in negligence actions have defenses available ranging from common law sovereign immunity to more affirmative defenses. The motivation behind common law immunity is to limit the flow of public money to private citizens because such payments detract from the educational functions of the schools. Affirmative defenses bar recovery by parties whose behavior in some way caused their injuries.

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[30] Pettry v. Rapid City Area Sch. Dist., 630 N.W.2d 705 [155 Educ. L. Rep. 1356] (S.D. 2001).

[31] Elliott v. City of N.Y., 724 N.Y.S.2d 397 [153 Educ. L. Rep. 751] (N.Y. Ct. App. 2001).

[32] Merson v. Syosset Cent. Sch. Dist., 730 N.Y.S.2d 132 [156 Educ. L. Rep. 1276] (N.Y. App. Div. 2001).

[33] Schlecter v. Abbondandello, 731 N.Y.S.2d 497 [157 Educ. L. Rep. 823] (N.Y. App. Div. 2001).

Immunity

A teacher from Indiana fell and was injured in a school parking lot while attempting to enter the building to watch a wrestling match. The teacher sued her school board for negligence, a case involving both common law and statutory immunity. An appellate court reversed a grant of summary judgment in favor of the board in determining that a material issue of fact remained over whether the ice and snow in the parking lot and on a sidewalk was a temporary condition.[34] The court added that since the board failed to use ordinary and reasonable care under the circumstances, it could not invoke sovereign immunity.

Common Law (Governmental Immunity)

When a motorist was injured in a collision with a school bus, he unsuccessfully sued a school board and the driver. On further review, the Supreme Court of Mississippi affirmed that the board could not be liable because it was not served in a timely manner while the driver was shielded by governmental immunity since he was acting in the course and scope of his employment.[35]

A father with legal custody of his son sued a school board and principal on the ground that releasing the child to his mother was both negligent and an intentional interference with the father's custodial rights. The Supreme Court of Alaska affirmed that since the principal's acts were clearly discretionary, he was protected by qualified immunity.[36] The court held that the principal acted with deliberation and considered judgment in calling the father to verify the mother's identification, discussing the matter with a police officer, and reviewing documents that the mother had in her possession.

Statutory Immunity

A student with a development disability was injured when the stroller she was in tipped over backward as it was placed in a closet, propped up against the open closet door. The student's parents unsuccessfully filed a negligence action, as the Supreme Court of Colorado affirmed that the plaintiffs failed to show sufficient jurisdictional facts to support a waiver of statutory immunity since they merely alleged that the facility was used in an unsafe manner rather than claiming a construction or maintenance activity or omission for which the school board may have been responsible.[37]

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[34] Hertz v. Sch. City of E. Chi., 744 N.E.2d 484 [152 Educ. L. Rep. 252] (Ind. Ct. App. 2001).

[35] Cotton v. Paschall, 782 So. 2d 1215 [153 Educ. L. Rep. 827] (Miss. 2001).

[36] Pauley v. Anchorage Sch. Dist., 31 P.3d 1284 [157 Educ. L. Rep. 363] (Alaska 2001).

[37] Padilla v. Sch. Dist. No. 1, 25 P.3d 1176 [155 Educ. L. Rep. 869] (Colo. 2001).

A middle school student in Kansas who broke his arm during physical education class challenged a grant of summary judgment in favor of his school board. An appellate court affirmed that the gymnasium's use for recreational purposes beyond incidental use qualified it for exception to a general waiver of immunity under the state's tort claims act.[38]

After a jury rendered a verdict in favor of the father of an eighteen-year-old who was involved in a traffic accident with a school bus, an appellate court granted the state department of education's motion for relief from judgment. On further review, the Supreme Court of South Carolina vacated the earlier judgment and reinstated the award.[39] The court noted that the department was not entitled to relief where its motion was filed more than a year after judgment was entered and the proper avenue for relief was a motion for rehearing.

A student in Wisconsin who broke his leg during recess challenged a grant of summary judgment in favor of a school board. An appellate court reversed in favor of the student in explaining that the sole issue was one of statutory interpretation of the state's recreational immunity statute.[40] The court concluded that the statute was inapplicable since, due to the negligence of school personnel, the student sustained his injury on a school playground during a mandatory recess period and had not entered the area to engage in a recreational activity.

In the first of four cases from Illinois, a fourth-grade student in a physical education class suffered permanent facial injuries due to falling while jumping over a rope stretched between two poles. The student's father sought further review of a grant of summary judgment in favor of the school board, prompting an appellate court to reverse and remand on the basis that the allegations against the board for not maintaining its property in a reasonably safe condition were not protected by the state's tort claims act.[41] In addition, the court was of the opinion that issues of fact remained as to whether the teacher who purchased the poles at a garage sale had the discretionary power to do so, and if so, whether this was an exercise of that authority or mere negligence.

Where students in a high school physical education class were given a choice of running or in-line skating, one who chose the latter unsuccessfully sued the school board for negligence after he broke two bones while attempting to in-line skate around a wooden gym floor. On further review, an appellate court reversed a dismissal in favor of the board.[42] The court declared that even though the board's permitting the teacher to allow students to use in-line skates was an exercise of discretion, it was not immune from liability since it had an independent affirmative duty to provide students with equipment that would protect them from serious injury.

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[38] Jackson v. Unified Sch. Dist. No. 259, 31 P.3d 989 [157 Educ. L. Rep. 346] (Kan. Ct. App. 2001).

[39] Tench v. S.C. Dep't of Educ., 553 S.E.2d 451 [158 Educ. L. Rep. 451] (S.C. 2001).

[40] Auman v. Sch. Dist. of Stanley-Boyd, 635 N.W.2d 762 [159 Educ. L. Rep. 321] (Wis. 2001).

[41] Catberro v. Naperville Sch. Dist. No. 203, 739 N.E.2d 115 [150 Educ. L. Rep. 789] (Ill. Ct. App. 2000).

[42] Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15, 740 N.E.2d 47 [150 Educ. L. Rep. 809] (Ill. Ct. App. 2000).

A student who suffered from cerebral palsy unsuccessfully sued her school board to recover for injuries she sustained while working at a concession stand during a high school basketball game when she slipped and fell on steps that were wet from snow. An appellate court in Illinois reinstated the student's claim.[43] The court observed that statutory immunity, based on an injury caused by the effect of weather, was inapplicable because the student's injuries were caused by a teacher's exercise of control over her activities rather than the weather itself.

In Illinois, an appellate court reversed a grant of summary judgment in favor of a school board that was sued by a mother who was injured when she fell in a hole in a gymnasium's parking lot after her son's basketball game.[44] The court was convinced that the board was not entitled to statutory immunity because, even though the woman was watching her son play in a nonschool-related league, the school was a multi-use facility and its parking lot was substantially connected to the entire school, not incidentally to the gymnasium.

Where a cheerleader was injured in practice as she fell while attempting a shoulder dismount, an appellate court in Pennsylvania affirmed a grant of summary judgment in favor of the school board. The court agreed that, even though assumption of risk was improvidently accepted at trial, since it could not be established that the cheerleader expressly or contractually assumed the risk this was a harmless error.[45] Rather, the court relied on the fact that the board's alleged negligent conduct of failing to provide gymnasium mats did not fall within the real property exception of the state's tort claims act because gymnasium mats are in no way affixed to the real property.

In Texas, a superintendent was sued by a former teacher who resigned pursuant to an agreement with the school board.[46] An appellate court reversed the denial of the superintendent's motion for summary judgment, reasoning that the superintendent's comments to the media over the circumstances under which the teacher resigned were covered by the state's professional immunity statute. In rejecting the teacher's breach of contract claim, the court pointed out that considering whether to talk with the media and selecting a response are discretionary acts which rendered the superintendent immune from a lawsuit.

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[43] Manuel v. Red Hill Cmty. Unit Sch. Dist. No. 10 Bd. of Educ., 754 N.E.2d 448 [156 Educ. L. Rep. 1242] (Ill. Ct. App. 2001).

[44] Adamczyk v. Township High Sch. Dist. 214, 755 N.E.2d 30 [158 Educ. L. Rep. 738] (Ill. Ct. App. 2001).

[45] Rieger v. Altoona Area Sch. Dist., 768 A.2d 912 [151 Educ. L. Rep. 982] (Pa. Commw. Ct. 2001).

[46] Deaver v. Bridges, 47 S.W.3d 549 [155 Educ. L. Rep. 928] (Tex. App. 2000).

In Minnesota, a student who was injured when he fell from a pile of snow onto a piece of ice filed a negligence action against the school board and various officials. An appellate court affirmed the denial of the defendants' motion for summary judgment in agreeing that the board failed to present adequate proof that its placing snow on the playground was a planning-level decision that was entitled to statutory immunity.[47]

Other Defenses

Contributory/Comparative Negligence

A middle school student filed suit to recover for injuries he incurred at home, where he struck a shotgun shell after hearing a firearms safety-related presentation. Where he challenged a grant of summary judgment in favor of school officials and the department of natural resources, the Supreme Court of Indiana was of the view that while genuine issues of material fact precluded a grant of summary judgment, the student's being found minimally negligent as a matter of law by having hit the shell with an hammer and chisel meant that the doctrine of contributory negligence barred his recovery as a matter of law.[48]

The mother of a high school student sued a school board, principal, and bus driver for damages that her son incurred in a fight that took place after he left his school bus. On further review, an appellate court in Louisiana modified a jury verdict in favor of the student. The court asserted that since school employees failed to follow appropriate policies for preventing a fight where they had advanced notice of a problem, the board was 20 percent at fault.[49] The court assessed the three students 25 percent of the liability while the injured student was 5 percent at fault for not informing the driver of threats that he received. Insofar as the three students (75 percent liable, in sum) were voluntarily dismissed from the suit before trial by virtue of not having reached the age of majority, the court increased the board's liability to 50 percent under the principle of solidary liability.

Notice of Claim

In the first of five cases from New York, an appellate court affirmed that a student who injured his hand in technology class was properly permitted to file a late notice of claim against a school board.[50] The court noted that neither the board's alleged failure to investigate the accident nor the failure of the student's father to retain counsel until he feared his insurance benefits would not cover the cost of treating his son and he learned the injuries could be permanent, constituted adequate bases for denying the motion to file a late notice of claim.

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[47] Fear v. Indep. Sch. Dist. 911, 634 N.W.2d 204 [157 Educ. L. Rep. 323] (Minn. Ct. App. 2001).

[48] Mangold v. Dep't of Natural Res., 756 N.E.2d 970 [157 Educ. L. Rep. 861] (Ind. 2001).

[49] Frazer v. St. Tammany Parish Sch. Bd., 774 So. 2d 1227 [150 Educ. L. Rep. 577] (La. Ct. App. 2000).

[50] Hayes v. Peru Cent. Sch. Dist., 722 N.Y.S.2d 104 [152 Educ. L. Rep. 231] (N.Y. App. Div. 2001).

An appellate court in New York affirmed that a minor was entitled to enter a late notice of claim in a dispute where school officials received complaints within three days of the initial incident and had actual notice of the underlying facts within ninety days.[51] The court contended that the failure to serve notice in a timely fashion was excusable due to the plaintiff's infancy.

In New York, a student fell while walking away from the school bus he had just exited, and unsuccessfully sued a school board to recover damages for injuries he sustained. An appellate court affirmed both the board's motion to dismiss the complaint and the denial of the student's cross motion to serve a late notice of claim.[52] The panel posited that the trial court properly exercised its discretion in denying the late notice since the plaintiff failed to provide an excuse for the two-year delay in his seeking such a motion because his infancy was unrelated to his claim and the delay substantially prejudiced the board's ability to investigate the charges.

A worker who was injured on a school construction project sought further review of the denial of his motion to file a late notice of claim against a school board. An appellate court in New York affirmed the denial of the plaintiff's application since more than ninety days elapsed between the date when he was told of his injury and when he applied to file a late notice of claim.[53]

When a woman was injured as she fell while descending a step from a public school restroom, an appellate court in New York affirmed the denial of her motion to serve a late notice of claim on a city.[54] The court indicated both that the city was not a proper party in the suit and that the plaintiff filed her motion to amend her complaint and add the school board after the statute of limitations expired.

A dispute arose in Indiana over whether a motorist, seeking to recover damages for injuries he suffered when his truck was struck by a school bus, met notice requirements. An appellate court ascertained that a letter from the motorist's attorney adequately informed the school board of his intent to make a claim and was sufficient as to time, place, and nature of his injuries even though it did not specifically state that he intended to file a claim.[55]

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[51] Russo v. Monroe-Woodbury Cent. Sch. Dist., 723 N.Y.S.2d 198 [152 Educ. L. Rep. 756] (N.Y. App. Div. 2001).

[52] Johnson v. Katonah-Lewisboro Sch. Dist., 727 N.Y.S.2d 171 [155 Educ. L. Rep. 766] (N.Y. App. Div. 2001).

[53] Cuda v. Rotterdam-Mohonasen Cent. Sch. Dist., 727 N.Y.S.2d 751 [155 Educ. L. Rep. 770] (N.Y. App. Div. 2001).

[54] Goldman v. City of N.Y., 732 N.Y.S.2d 78 [158 Educ. L. Rep 774] (N.Y. App. Div. 2001).

[55] Porter v. Fort Wayne Cmty. Sch., 743 N.E.2d 341 [151 Educ. L. Rep. 558] (Ind. Ct. App. 2001).

A father filed a negligence claim against a school board after his daughter was abducted by her mother, despite his having provided written notification that the mother should not pick the child up at school without a signed court order. An appellate court in Mississippi affirmed the dismissal of his complaint as time barred.[56] In applying strict, rather than the lower substantial-compliance, standard, the court believed that since amendments extending the time limits for filing a claim were not yet in effect when the negligence claim accrued, they could not be applied to the statute of limitations.

Liability Insurance

The insurer of a motorist who was injured in an accident with a school bus challenged the rejection of its motion for a declaratory judgment which claimed that since the bus was an "underinsured vehicle," it should have been relieved of its responsibility for further coverage. The Supreme Court of Nebraska affirmed that the school bus did not fit the definition under either the insurance policy or the state's Uninsured and Underinsured Coverage Act since the latter specifically excluded government-owned vehicles from the "underinsured" designation.[57]

When a liability insurer obtained a declaration that it had no duty to defend a school board from suits arising as a result of the collision between a school bus and a train, the Supreme Court of Illinois affirmed in favor of the company.[58] The court determined that the complaints did not allege that student injuries were the result of events wholly independent of any negligent operation of the bus. The court added that allegations of the board's failure to have an adequate safety plan, to inspect bus routes, or to warn bus drivers of potential hazards merely rephrased the fact that the student's injuries arose from the board's use of the bus.

In a second case from Illinois, when a student who was injured while riding in a car driven by one of her teachers filed suit, a school board's automobile insurer sought a declaratory judgment that its business policy only provided excess coverage for the teacher when she was driving in the course of her employment. An appellate court affirmed that since the board's business policy only provided primary coverage for those vehicles that it actually owned, the teacher's insurance company was liable for primary coverage.[59]

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[56] Burge v. Richton Mun. Separate Sch. Dist., 797 So. 2d 1062 [158 Educ. L. Rep. 901] (Miss. Ct. App. 2001).

[57] Continental W. Ins. Co. v. Conn., 629 N.W.2d 494 [155 Educ. L. Rep. 841] (Neb. 2001).

[58] Northbrook Prop. and Cas. Co. v. Transp. Joint Agreement, 741 N.E.2d 253 [152 Educ. L. Rep. 734] (Ill. 2000).

[59] Country Mut. Ins. Co. v. Teachers Ins. Co., 755 N.E.2d 136 [157 Educ. L. Rep. 802] (Ill. Ct. App. 2001).

Employee Injuries

A special education teacher was injured when she fell through a trap door in a school office as she helped return computer equipment to the school. The school board sought further review of a judgment in the plaintiff's favor, and the Supreme Court of Nebraska affirmed that although the dispute was not covered by workers' compensation because the teacher's injuries did not arise in the course of her employment, she was not precluded from bringing a tort action against the board.[60] The court also affirmed that since the teacher was a business invitee, she was entitled to damages because she was not contributorily negligent when she failed to turn on the lights.

An appellate court in New York held that, absent a showing of a special duty, a city could not be liable for injuries that a school custodian received when he was shot by an unidentified man who forced his way inside the school after the custodian opened the main door.[61] The court noted that the alleged negligence did not stem from the city's failure to fulfill its proprietary duties as owner or lessee of the building, but instead involved the governmental function of implementing security measures.

Where a high school teacher was injured when she collided with a visually and hearing-impaired student, an appellate court in New York dismissed her action against a board of cooperative educational services.[62] The court refused to impose liability in the absence of a special duty that was not present based on her status since she was in the same position as every other school employee.

A teacher who was injured when pushed by a student on an overnight camping trip unsuccessfully sued the campground. An appellate court in New York affirmed a grant of summary judgment in favor of the campground in agreeing that the owners did not owe the teacher a common law duty to provide extra supervision for the student group.[63]

Workers' Compensation

The Supreme Court of Ohio affirmed that a probationary teacher who was injured at the end of a school year was entitled to a workers' compensation award of temporary total disability compensation when she was unable to perform her usual summer job.[64] The court wrote that neither receiving a twelve-month salary nor prorating summer income diminished the teacher's claim.

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[60] Skinner v. Ogallala Pub. Sch. Dist. No. 1, 631 N.W.2d 510 [155 Educ. L. Rep. 1395] (Neb. 2001).

[61] DiGravina v. City of N.Y., 717 N.Y.S.2d 633 [150 Educ. L. Rep. 233] (N.Y. App. Div. 2000).

[62] Firestein v. Gavlyayev, 722 N.Y.S.2d 589 [152 Educ. L. Rep. 242] (N.Y. App. Div. 2001).

[63] Ahmadi v. Greater N.Y. Councils, Inc., 724 N.Y.S.2d 408 [153 Educ. L. Rep. 943] (N.Y. App. Div. 2001).

[64] State *ex rel.* Crim v. Ohio Bureau of Workers' Comp., 751 N.E.2d 990 [155 Educ. L. Rep. 1324] (Ohio 2001).

In the first of two cases from Louisiana, a school board challenged an award of benefits to a custodian who injured his back. The court reversed in favor of the board in acknowledging that the custodian failed to meet the burden of proving that a mopping accident caused his disability.[65]

Where the office of workers' compensation limited its award to a teacher who was injured when assaulted by a student, an appellate court in Louisiana reversed in her favor.[66] The court decided that the teacher was entitled to workers' compensation and assault pay benefits as long as their total did not exceed her pre-injury salary.

A teacher in New York who received workers' compensation benefits for a psychiatric condition that was caused by an injury to her head returned to work but was denied tenure and dismissed for poor job performance. The workers' compensation board rejected the teacher's request for benefits based on her claim that her ineffectiveness on the job and her dismissal were causally related to her previously compensable condition. On further review, an appellate court affirmed the dismissal in remarking that the teacher's symptoms of stress were related to poor work evaluations rather than to her original injury.[67]

Defamation/Intentional Infliction of Emotional Distress

In a case from Iowa, the Eighth Circuit reviewed the claims of a former director of technology who successfully brought a defamation action against an associate superintendent. The court affirmed that it was a question of fact for the jury to consider whether the associate superintendent's characterization of the director as dangerous was true.[68] The court thus upheld a jury verdict that the associate superintendent's ill will toward the director supported the finding that his statements were defamatory because they were made with actual malice.

Prompting a defamation suit, parents distributed handouts that set forth portions of a complaint from a child abuse suit filed against the director of a private school. After the director's defamation suit was dismissed, he challenged the dismissal and the Supreme Court of Nevada reversed as a matter of law in explaining that it was up to a jury to consider whether the statements in the handout constituted fact or opinion as well as whether they were defamatory.[69]

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[65] Thompson v. Orleans Parish Sch. Bd., 786 So. 2d 128 [155 Educ. L. Rep. 948] (La. Ct. App. 2001).

[66] Anderson v. Orleans Parish Sch. Bd., 792 So.2d. 943 [156 Educ. L. Rep. 1455] (La. Ct. App. 2001).

[67] Vaupell v. City of Buffalo Bd. of Educ., 732 N.Y.S.2d 142 [158 Educ. L. Rep. 777] (N.Y. App. Div. 2001).

[68] Smith v. Des Moines Pub. Sch., 259 F.3d 942 [156 Educ. L. Rep. 56] (8th Cir. 2001).

In New Jersey, a principal challenged a jury verdict in favor of a custodian. The custodian sued for defamation after the principal filed criminal trespass charges with the police when the custodian refused to follow his order to leave a school building. An appellate court in New Jersey reversed in favor of the principal on the basis that filing a criminal charge was not defamation per se and that the custodian failed to show actual malice.[70]

The mother of a student in Louisiana claimed that a teacher grabbed and injured her son's arm. The teacher prevailed in her defamation and intentional infliction of emotional distress suit on the basis of the mother's having described the incident to a parent volunteer who answered a school phone because the principal was not available.[71] The court agreed that the mother's words to the volunteer were defamatory since there was no evidence that they were true and she intended to injure the teacher's reputation, expose her to public ridicule, and deprive her of public confidence in her occupation.

In South Carolina, an appellate court affirmed an award in favor of an African American assistant principal who filed a defamation suit against an African American minister who twice used a racial slur in the presence of others in connection with his role in disciplining an African American student.[72] The court agreed that the award was justified since the assistant principal was not a public official who had to prove actual malice on the part of the speaker before he could recover damages.

Conversely, an appellate court in Massachusetts affirmed a grant of summary judgment in favor of a newspaper and judgment notwithstanding the verdict for a union when a school board's director of maintenance and transportation sued them for defamation and intentional interference with contractual relations.[73] The court declared that since the director was a public official, there was insufficient evidence that articles had been published with actual malice or that they were the proximate cause of the nonrenewal of his contract.

A middle school teacher was accused of assault and battery, negligence, and intentional infliction of emotional distress in connection with corporal punishment she inflicted on a student that she overheard repeating a profanity. The teacher challenged a verdict in favor of the child. An appellate court in Alabama affirmed that insofar as the teacher's discretion to inflict corporal punishment removed her actions from the scope of discretionary immunity, there was sufficient evidence she acted with legal malice.[74]

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[69] Lubin v. Kunin, 17 P.3d 422 [150 Educ. L. Rep. 963] (Nev. 2001).

[70] Pitts v. Newark Bd. of Educ., 766 A.2d 1206 [151 Educ. L. Rep. 517] (N.J. Super. Ct. App. Div. 2001).

[71] Huxen v. Villasenor, 798 So. 2d 209 [158 Educ. L. Rep. 909] (La. Ct. App. 2001).

[72] Goodwin v. Kennedy, 552 S.E.2d. 319 [157 Educ. L. Rep. 387] (S.C. Ct. App. 2001).

[73] Netherwood v. Am. Fed'n of State, County and Mun. Employees, Local 1725, 757 N.E.2d 257 [158 Educ. L. Rep. 424] (Mass. Ct. App. 2001).

In North Carolina, a teacher unsuccessfully sued her school board and various officials for intentional infliction of emotional distress. After her principal received a complaint from the mother of one of her students, the teacher claimed that class tests scores were falsified to cause her embarrassment among her colleagues, and she was put on an onerous remediation plan, intrusively videotaped, transferred to another school, and deprived of start-up materials that were given to teachers. An appellate court affirmed a grant of summary judgment in favor of the board in observing that, for the most part, the defendants complied with board procedures for evaluating and eliminating problematic teachers.[75] The court conceded that even assuming that school officials went through the motions in bad faith based on personal animosity toward the teacher, their conduct did not exceed the bounds of decency.

An appellate court in Texas affirmed that a television station was not subject to liability for invasion of privacy, defamation, and intentional infliction of emotional distress.[76] The station broadcast portions of a videotape made by a high school band director in an attempt to discover who was going through students' belongings, but which showed female students changing their clothes. The court was of the opinion that the complaint was not actionable because the broadcasts, which were on a matter of legitimate public concern, neither defamed the students nor invaded their privacy.

In Connecticut, a school psychologist unsuccessfully filed claims of intentional and negligent infliction of emotional distress against her school board, alleging that its members engaged in a plan to force her to resign or become so distraught that it would have had a basis for terminating her employment. An appellate court affirmed that even though the board's actions in examining every detail of the psychologist's professional and personal conduct, involuntarily transferring her, and publicly chastising her may have been hurtful and distressful, they were not extreme and outrageous enough as to support her claim.[77]

Constitutional Torts

Student-Initiated Title IX Cases

The Fourth Circuit affirmed a jury verdict in favor of a former student from Virginia who filed a title IX claim of sexual abuse against his teacher.[78]

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[74] Hinson v. Holt, 776 So. 2d 804 [151 Educ. L. Rep. 343] (Ala. Ct. App. (1998).

[75] Stamper v. Charlotte-Mecklenburg Bd. of Educ., 544 S.E.2d 818 [152 Educ. L. Rep. 832] (N.C. Ct. App. 2001).

[76] Doe v. Mobile Video Tapes, 43 S.W.3d 40 [153 Educ. L. Rep. 806] (Tex. App. 2001).

[77] Dollard v. Bd. of Educ. of Orange, 777 A.2d 714 [156 Educ. L. Rep. 273] (Conn. Ct. App. 2001).

[78] Baynard v. Malone, 268 F.3d 228 [158 Educ. L. Rep. 19] (4th Cir. 2001).

The court reasoned that since the principal failed to take appropriate actions after the plaintiff informed him that the teacher—who was still employed by the school board—had abused him fifteen years earlier, the principal acted with deliberate indifference. At the same time, the court affirmed that since the personnel director and superintendent did not have actual knowledge of the molestation, they were not liable.

A student in Kansas sought further review of a grant of summary judgment in favor of a school board he sued under title IX and section 1983 over claims arising from his two-year sexual relationship with a male teacher. The Eighth Circuit affirmed that the board could not be liable because it could not be inferred by a totality of the facts whether school officials had notice of the teacher's acts and failed to investigate.[79] The court relied on the fact that the student did not complain about the sexual misconduct until after the relationship ended.

In Illinois, a student sued a school board, alleging discrimination on the basis of sex and retaliation against him in violation of title IX.[80] A federal trial court granted the board's motion to strike the claims for punitive damages on the ground that it could not be exposed to punitive damages for the misconduct of its officials.

The parents of a middle school student who was mildly retarded claimed that a principal and school board violated title IX in their response to alleged same-sex harassment of their son. A federal trial court in Texas granted the defendants' motion for summary judgment since there was no evidence of deliberate indifference to the student's situation.[81] The court further indicated that a single incident was insufficient to trigger liability because the alleged perpetrator had never done anything to the victim beyond simple bullying.

In New York, the mother of a high school student filed a sex discrimination claim under section 1983, alleging that a school board and various officials violated title IX. A federal trial court granted the board's motion to dismiss in ascertaining that the mother lacked standing since only the person toward whom the action was directed can maintain a section 1983 claim.[82]

Other Student Constitutional Claims

The first of two Eighth Circuit cases from Nebraska involved a parent who unsuccessfully filed suit under title IX seeking to recover damages for the sexual molestation of her son by a teacher formerly employed by a school board. The court affirmed that the board's having entered into a confidential agreement with the teacher and providing him with a neutral letter of recommendation, rather than terminating his employment outright, did not rise to the level of deliberate indifference so as to warrant liability under section 1983.[83] The court was of the view that the record reflected that school officials did not have actual knowledge of the teacher's misconduct. The court declared that since any alleged cover-up by the superintendent did not create a direct link between the abuse and his scope of control, there could be no liability under title IX.

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[79] P.H. v. Sch. Dist. of Kan. City, Mo., 265 F.3d 653 [157 Educ. L. Rep. 42] (8th Cir. 2001).

[80] Landon v. Oswego Unit Sch. Dist. No. 308, 143 F. Supp.2d 1011 [155 Educ. L. Rep. 194] (N.D. Ill. 2001).

[81] Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp.2d 690 [155 Educ. L. Rep. 220] (E.D. Tex. 2001).

[82] Morgan v. City of N.Y., 166 F. Supp.2d 817 [158 Educ. L. Rep. 239] (S.D.N.Y. 2001).

In the second case, a student and her parents sued her band teacher and school board for intentional infliction of emotional distress and violation of her civil rights. The Eighth Circuit affirmed that although the student previously received special education services and was subsequently denied them since she was never specifically verified as having a disability, she was not deprived of procedural due process.[84] The court agreed that a teacher's calling the student "retarded," "dumb," and "stupid" in front of her class and later throwing a notebook at her was not shocking to the conscience at a level sufficient to establish a violation of substitutive due process. The court concluded that the student failed to establish that her removal from the band class violated her right to equal protection.

A high school student in Pennsylvania unsuccessfully filed a section 1983 action and state claims against a school board and an assistant principal who allegedly used excessive force against her during an altercation. The Third Circuit affirmed a dismissal in favor of the defendants on the section 1983 claim on the basis that the student failed to allege a direct connection between any school board practice and her injury.[85] As to the assistant principal, the court found that his allegedly having pushed the student was not a "seizure" but was reviewable under, and failed to meet, the "shocks the conscience" standard of the due process clause.

In a second case from Pennsylvania, parents sued a school board and various officials, alleging a violation of section 1983 under the state-created danger doctrine. The court granted the defendants' motion for summary judgment in holding that they were not liable for the injuries allegedly suffered by the child as a result of being the target of other students' teasing and physical abuse.[86] The court pointed out that there was no showing that the harm that the student suffered was the foreseeable result of action or inaction by school personnel who, in fact, did not willfully disregard the problem when they became aware that the dangerous condition existed.

Parents of an elementary school student who was sexually abused by his teacher over a five-year period sued a school board for fraud in misrepresenting their actions in investigating the complaint and, under section 1983, for violating their constitutional right to parent. The federal trial court in Minnesota partially granted the board's motion to dismiss as time barred.[87] The court ruled that while section 1983 does not have a specific statute of limitations, it would apply the state's six-year limitation. Insofar as the fraud claim failed to specify the time, place, and contents of allegedly false representations as well as the identity of persons who made them, the court directed the parents to plead more definite statements.

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[83] Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773 [153 Educ. L. Rep. 600] (8th Cir. 2001).

[84] Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 [157 Educ. L. Rep. 520] (8th Cir. 2001).

[85] Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168 [159 Educ. L. Rep. 16] (3rd Cir. 2001).

[86] Nordo v. Sch. Dist. of Phila., 172 F. Supp.2d 600 [159 Educ. L. Rep. 138] (E.D. Pa. 2001).

Conclusion

This year witnessed a modest overall decline in the number of cases reported across all categories of torts. In one of the areas where there was a decrease, the lack of constitutional claims from employees, it is likely that this is more a coincidence than the start of a trend.

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[87] Helleloid v. Indep. Sch. Dist. 361, 149 F. Supp.2d 863 [155 Educ. L. Rep. 450] (D. Minn. 2001).

6

SPORTS

David P. Thompson

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Introduction

This chapter reviews cases in K-12 and in higher education addressing student-athletes, coaches, athletic directors, facilities, and associations. With limited exceptions, this chapter does not address litigation pertaining to the instruction of physical education.

Eligibility

This section contains sixteen cases. The first one challenges a state high school athletic association's longevity rule, two pertain to recruiting, five address academic eligibility, two deal with other eligibility requirements, three concern transfer rules, two address discipline of student-athletes, and the final case considers the Postbaccalaureate Bylaw of the National Collegiate Athletic Association (NCAA).

Longevity

The Pennsylvania Interscholastic Athletic Association (PIAA) prohibits students who turn nineteen prior to July 1 of an upcoming school year from participating in interscholastic sports. A student with a learning disability who received special education under the Individuals with Disabilities Education Act (IDEA) and whose disability prevented him from starting high school with similarly aged peers challenged the PIAA's rendering him ineligible since he was nineteen. The student sought a permanent injunction, claiming that enforcement of the rule, in view of the fact that the PIAA did not have an age-waiver process, violated his rights under the IDEA, Section 504 of the Rehabilitation Act of 1974 (section 504), and the Americans with Disabilities Act (ADA). Although denying the motion under the IDEA for failure to exhaust administrative remedies and under section 504 since the PIAA was not federally funded, the court granted the motion under the ADA.[1] The court determined that the student was a qualified individual with a disability and whether waiving the age-limit rule was a reasonable modification was a question to be resolved on a case-by-case basis, taking into account whether a waiver would fundamentally alter the nature of the competition. Moreover, the court found that an age-waiver rule would not unduly burden the PIAA.

Recruiting

A private high school in Tennessee sued the state secondary athletic association, claiming that its enforcement of a rule which prohibited "undue influence" in recruiting, stemming from a coach's having contacted incoming students and parents to remind them of spring football practice, violated the First Amendment's free speech clause. After a federal trial court enjoined enforcement of the rule, the Sixth Circuit reversed, vacated, and remanded, holding that the association's enforcement was not state action. On further review, the Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*[2] reversed and remanded on the basis that the association's enforcement actions constituted state action under the Fourteenth Amendment as enforced through section 1983. The court ruled that the "pervasive entwinement" of the association and the state, as evidenced by, for example, the facts that 84 percent of its voluntary members were public schools, that it was governed by a legislative council and board of control elected by its membership, that its meetings took place during school hours, that state board of education members serve as ex officio members of the legislative council and board of control, and that its staff members are eligible to participate in the state retirement system, required it to conclude that the group's enforcement authority was state action subject to constitutional standards.

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[1] Cruz v. Pa. Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485 [156 Educ. L. Rep. 633] (E.D. Pa. 2001).

On remand, the Sixth Circuit reversed the original grant of summary judgment in favor of the school and remanded for further proceedings but rejected the association's claim that the school, by voluntarily choosing to join, waived its right to challenge the constitutionality of the recruiting rule.[3] The court decided that the rule, for purpose of free speech analysis, was a content-based regulation subject to strict scrutiny and, as such, was a content-neutral regulation, with reasonable time, place, and manner restrictions. The panel noted that on remand, the trial court would have to consider whether the association could prove the existence of a significant governmental interest in enforcing the recruiting rule and whether it was narrowly tailored to achieve its stated goal. Further, the court was of the opinion that the rule was not overbroad since it provided sufficient directions through questions and answers explaining how it put the officials at the high school on notice as to what it prohibited.

Academic Eligibility

In the first of five cases addressing academic eligibility, the NCAA rendered a high school football player with a learning disability a nonqualifier since, by taking special education classes, he did not complete its requisite "core courses." As a partial qualifier, who was originally ineligible to compete for four years, the student sued the NCAA, the ACT Corporation which operates the NCAA Initial Eligibility Clearinghouse (ACT/Clearinghouse), and three universities under the Americans with Disabilities Act, section 504, and the New Jersey Law Against Discrimination (NJALD), alleging that the initial eligibility requirements discriminated against him due to his learning disability. The federal trial court granted the NCAA's motion for reargument, agreeing that it overlooked the dispositive fact that the NCAA's rules changed to give nonqualifiers an opportunity to regain a fourth year of eligibility. The court believed that the student lacked standing to seek injunctive relief under title III of the ADA against the NCAA and one of the schools or under section 504 against the NCAA and three of the universities. The court denied one school's motion for reargument on the remaining claims in rejecting its defense that it overlooked evidence that the student allegedly lacked interest in playing football there.[4]

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[2] 531 U.S. 288 [151 Educ. L. Rep. 18] (2001).

[3] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 262 F.3d 543 [157 Educ. L. Rep. 467] (6th Cir. 2001).

The court subsequently considered the student-athlete's claim under the NJLAD against all defendants, reasoning that the NJLAD applied to the NCAA, the universities, and the ACT/Clearinghouse and that this did not violate due process since there were sufficient minimum contacts between the entities and the state. The court was convinced that the NCAA, acting on behalf of its member institutions, is a place of public accommodation subject to the NJALD. The court added that the ACT/Clearinghouse was not liable under the NJALD, in the absence of evidence that it knowingly aided and abetted the NCAA in the alleged discrimination.[5]

African American student-athletes from Pennsylvania sued the NCAA, alleging that the use of minimum cut-off scores on college entrance exams for initial eligibility requirements violated title VI. The Third Circuit reversed a grant of summary judgment in favor of the students on their title VI disparate impact claim and remanded the matter to the trial court.[6] The students subsequently filed motions to amend their complaint to advance a disparate treatment theory of liability under title VI. After a federal trial court denied the plaintiffs' motions,[7] the Third Circuit affirmed that the trial court had not abused its discretion.[8] The panel relied on the trial court's having pointed out that granting leave to amend would have caused undue delay and placed undue prejudice on the NCAA. The panel referred to the trial court's findings that the plaintiffs characterized the NCAA's intentions in enacting the minimum cut-off scores "laudable" to agree that the NCAA would be significantly prejudiced if the motion for leave was granted.

In Ohio, a student-athlete signed a national letter of intent to play basketball which stipulated that the school would provide a scholarship in exchange for his meeting academic eligibility requirements. Although an investigation resulted in the student's being declared academically ineligible for the last three games (and postseason tournament games) of his freshman year, the NCAA ultimately restored his eligibility about one year later.

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[4] Bowers v. NCAA, 130 F. Supp.2d 610 [151 Educ. L. Rep. 501] (D.N.J. 2001).

[5] Bowers v. NCAA, 151 F. Supp.2d 526 [155 Educ. L. Rep. 1138] (D.N.J. 2001).

[6] Cureton v. NCAA, 198 F.3d 107 [140 Educ. L. Rep. 474] (3d Cir. 1999).

[7] Cureton v. NCAA, 2000 WL 388722 (E.D. Pa. 2000).

[8] Cureton v. NCAA, 252 F.3d 267 [154 Educ. L. Rep. 477] (3d Cir. 2001).

However, the student voluntarily left school during his sophomore year even though the university never withdrew the scholarship. In a suit against the university for breach of contract, promissory estoppel, defamation, and intentional infliction of emotional distress, the court ruled in favor of the defendants.[9] The court observed that since the student voluntarily withdrew and the university never rescinded the scholarship, his breach of written contract and promissory estoppel claims failed. The court dismissed the defamation claim since there was evidence that the student was less than forthcoming in his initial interviews with officials pursuant to the investigation, and any allegedly defamatory publications that they made were protected by qualified privilege. The court rebuffed the emotional distress claim, positing that the actions of university officials in dismissing the player from the team bus after learning of the NCAA's inquiry, while unfortunate, were not extreme and outrageous conduct which they knew or should have known would cause distress.

Two African American student-athletes in Pennsylvania who signed national letters of intent filed suit after they failed to meet the NCAA's freshman eligibility requirements. The first student, who had a learning disability, received a waiver allowing her to keep her scholarship, while the second challenged the denial of such a petition that resulted in the loss of both financial aid and eligibility. The students sued the NCAA, claiming discrimination under title VI and section 1981, while the one with the learning disability added claims under the ADA and section 504. A federal trial court granted the NCAA's motion for summary judgment on all claims.[10] The court was of the opinion that the student with the learning disability lacked standing since changes to the NCAA bylaws, which provide that those who do not meet initial eligibility requirements can regain four years of athletic eligibility, did not give it the power to provide the redress that she sought, namely declaratory and injunctive relief. The court rejected the disparate impact claim on the ground that title VI does not provide for a private right of action. The court added that since the student-athletes voluntarily entered into the contractual obligations imposed by the national letters of intent, the NCAA's treating them as partial- or nonqualifiers did not violate their rights to make and enforce contracts.

Other Eligibility

In the first of two cases on nonacademic eligibility, a wrestler petitioned the NCAA for an additional year of eligibility after it enacted weight class restrictions to prevent athletes from voluntarily undergoing rapid weight loss in order to "make weight" for wrestling competitions. When the NCAA denied the student's request, a state court granted his motion for a preliminary injunction giving him the extra year of eligibility. Even though the student completed the extra year of eligibility, the NCAA appealed. The Supreme Court of Appeals of West Virginia vacated the injunction, writing that the trial court abused its discretion since the wrestler did not have a right under state law to participate in athletics.[11] Similarly, the court remarked that the wrestler was not entitled to an injunction for breach of contract since there was no evidence that he and the NCAA were contractually obligated to each other.

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[9] Williams v. Univ. of Cincinnati, 752 N.E.2d 367 [155 Educ. L. Rep. 1343] (Ohio. Ct. Cl. 2001).

[10] Pryor v. NCAA, 153 F. Supp.2d 710 [156 Educ. L. Rep. 185 (E.D. Pa. 2001).

When a Nigerian citizen enrolled at a university in order to play basketball and officials discovered that he had allegedly been on a professional team in Russia, signed with a sports agent, and received benefits accruing from his professional status, it rendered him ineligible. The NCAA rejected a reinstatement petition which alleged the player's ignorance of NCAA regulations and other extenuating factors. A trial court not only enjoined the NCAA from enforcing the rule but struck the restitution bylaw down as invalid. An appellate court affirmed but did not address the issue of invalidating the bylaws. In an interlocutory appeal, the Supreme Court of Kentucky vacated the injunction as an abuse of discretion since the trial court made clearly erroneous findings unsupported by substantial evidence.[12] The court maintained that the NCAA relied on sound evidence that the player violated its bylaws. In addition, the panel indicated that the trial court abused its discretion, contending that the NCAA would not suffer any harm if the injunction were granted since it had a legitimate interest in enforcing its regulations. The panel specified that the lower court abused its discretion in invalidating the NCAA's restitution bylaws, noting that the university voluntarily agreed to abide by them and rejected the claim that the bylaws obstructed the judiciary's power to grant injunctive relief.

Transfer

In the first of three cases involving disputes over transfer rules of high school athletic associations, a student-athlete in Missouri sought a hardship waiver from a rule that would have prohibited him from participating in athletics at a new school for one year. When the student sought injunctive relief, the state activities association sued the judge, claiming that he lacked the jurisdiction to issue an injunction. On further review, an appellate court agreed with the association in holding that the constitutionality of the transfer rule had since been resolved in its favor.[13] Commenting that state case law only permits a court to review the association's actions when an allegation of due process violation, malice, fraud, or collusion is made (none of which had been raised), the panel issued a writ of prohibition which revoked the trial judge's jurisdiction over the claim.

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[11] Hart v. NCAA, 550 S.E.2d 79 [155 Educ. L. Rep. 1473] (W. Va. 2001).

[12] NCAA v. Lasege, 53 S.W.3d 77 [157 Educ. L. Rep. 398] (Ky. 2001).

[13] State *ex rel.* Mo. State High Sch. Activities v. Romines, 37 S.W.3d 421 [151 Educ. L. Rep. 696) (Mo. Ct. App. 2001).

Due to a deteriorating relationship with her parents, prior to the start of her senior year, a female high school basketball player in Indiana moved from home and transferred to another school in the same district. The state high school athletic association, pursuant to its ability to do so, limited the student's eligibility. Even though a trial court granted the student's request for a preliminary injunction, school officials, fearful of the association's restitution rule, which imposed competitive and financial sanctions against a school that plays a student-athlete who is ineligible, refused to permit her to play. A trial court granted the student's contempt order, complete with a $500.00 per day penalty against the association. On further review, an appellate court affirmed that the contempt order was clear and certain and that the association willfully violated the preliminary injunction by failing to compel the school to allow the student to participate.[14] The court affirmed the award of attorney fees since they were not duplicative of the contempt sanction.[15]

After the parents of a student in Indiana divorced and his mother suffered a substantial loss of income, she had to enroll him in a public school, rather than the private school which he previously attended. Even so, the state high school athletic association denied both the student's request for full eligibility to participate in varsity cross-country and his petition for an exception under the hardship transfer rule. The association challenged a temporary restraining order and a permanent injunction that had been entered in favor of the student. In applying the public interest exception to the mootness doctrine, an appellate panel in Indiana affirmed by applying a deferential standard of review in ascertaining that the earlier order was neither arbitrary nor amounted to a clear abuse of discretion.[16] The court simultaneously rejected the association's claims that its action was entitled to a deferential standard of review since it was convinced that officials acted arbitrarily and capriciously in attempting to insert a poverty standard into the hardship transfer rule when one had not existed previously.

Discipline

In Iowa, a high school basketball player wrote a letter to her teammates, which included profanity, to exhort her teammates to give back to the coach "some of the bullshit he has given us." On receiving a copy of the letter, the coach conditioned the student's continued participation on her apology to her teammates. When the student refused to apologize, was dropped from the team, and was not awarded a participation award, she unsuccessfully filed a

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[14] Indiana High Sch. Athletic Ass'n v. Martin, 741 N.E.2d 757 (Ind. Ct. App. 2000).

[15] Indiana High Sch. Athletic Ass'n v. Martin, 741 N.E.2d 775 [150 Educ. L. Rep. 915] (Ind. Ct. App. 2000).

[16] Indiana High Sch. Athletic Ass'n v. Durham, 748 N.E.2d 404 [154 Educ. L. Rep. 279] (Ind. Ct. App. 2001).

First Amendment free speech claim against the school board and individual defendants. On further review, the Eighth Circuit affirmed that the student was not entitled to protection since her letter did not result in material and substantial interference with the team's activities.[17] Rather, the court stated that the coach could reasonably regulate insubordinate, vulgar speech, particularly since the student handbook and basketball team's conduct rules prohibited both disrespect and insubordination.

When a high school softball player in Missouri missed a game without notifying her coach, a teammate reported that she attended another school's homecoming festivities. Even though the coach immediately cut the player from the team, she did not learn about it for several days and, when she did, she claimed that she missed the game when running an errand for her mother. The player did not seek reinstatement after the coach told her that her teammates did not want her to return and her request for a hearing was denied because she waived her right to be reinstated. The student sued the school board and coach for deprivation of due process, prima facie tort, intentional infliction of emotional distress, invasion of privacy, and defamation. A federal trial court granted the defendants' motion to dismiss all claims, holding that the student had no constitutionally protected property or liberty interest in participating in softball requiring that she be afforded pre- or post-expulsion due process.[18]

Postbaccalaureate Bylaw

A volleyball player who graduated from college in two and one-half years but was denied the opportunity to compete elsewhere challenged the NCAA's postbaccalaureate bylaw which allows students eligibility only at the schools from which they graduated. A federal trial court in Pennsylvania granted the NCAA's motion to dismiss in accepting its contention that it was not a recipient of federal funds in the student's suit, which alleged that the bylaw violated title IX's proscriptions of gender discrimination.[19] On appeal, the Third Circuit reversed in ruling that the NCAA's receipt of dues from member institutions which are federally funded meant that the complaint should have survived a motion to dismiss.[20] The Supreme Court subsequently vacated in favor of the NCAA in *NCAA v. Smith*.[21] On remand, the Third Circuit rejected the plaintiff's claim that the NCAA had "controlling authority" over member institutions that received federal financial assistance, noting that it did not have a choice as to whether member institutions received such aid.[22] Yet, the court allowed the student to argue that the NCAA's indirect receipt of federal funds through its relationship to and administration of the federally assisted National Youth Sports Program (NYSP) should bring it within the scope of title IX.

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[17] Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 [153 Educ. L. Rep. 595] (8th Cir. 2001).

[18] Wooten v. Pleasant Hope R-VI Sch. Dist., 139 F. Supp.2d 835 [154 Educ. L. Rep. 157] (W.D. Mo. 2000).

[19] Smith v. NCAA, 978 F. Supp. 213 [122 Educ. L. Rep. 171] (W.D. Pa. 1997).

[20] Smith v. NCAA, 139 F.3d 180 [129 Educ. L. Rep. 926] (3d Cir. 1998).

[21] 525 U.S. 459 [132 Educ. L. Rep. 33] (1999).

Equality of Programs

Gender

Of the five cases addressing gender equity in the administration of athletic programs, three occurred in the K-12 context, one was in higher education, and one involved a private athletic association. On behalf of a class of female plaintiffs, a father in Florida sued a county school board, charging that disparities between the boys' baseball and girls' softball programs violated title IX and a state statute. A federal trial court entered a judgment in favor of the girls when, in applying criteria from federal regulations to evaluate whether athletic programs are provided equitably under title IX, it determined that disparities existed with regard to equipment and supplies, specifically with regard to batting cages; in game and practice time schedules, since the girls' team played and practiced at a city-owned and -operated field without lights; and relating to locker room facilities.[23] The court ordered the school board to begin immediate work on a remedial plan as it set specific dates to implement the remedies.

In Michigan, an organization which promotes equity in women's athletics sued the state high school athletic association, alleging that the disparities in athletics for females violated title IX. As part of the suit, a federal trial court entertained a motion to exclude evidence pertaining to the Office for Civil Rights' (OCR) investigations. The investigations involved five school districts in the early to mid-1980s, an early 1980s case in which the state high school athletic association was a party, and an OCR investigation into the scheduling of girls' sports in South Dakota. The court granted the motion with regard to the 1980s OCR investigations and case, pointing out differences in the factual situation and case law.[24] However, the court denied the motion with regard to the South Dakota investigation in light of the recency of the investigation and factual similarities involving scheduling of sports seasons for females in the two states.

On behalf of their high school-aged daughters, parents in Virginia filed suit under title IX and the Equal Protection Clause against the state high school interscholastic activity association, alleging that its scheduling practices discriminated against female student-athletes. The claim relied on evidence that the association schedules athletic seasons of males at the same time of the year regardless of a school's size classification while it schedules the seasons of females at different times of the year based on a school's size classification. The claim further alleged that since high schools are reclassified every two years, a school with, for example, girls' volleyball season in the fall could find itself, after reclassification, with volleyball season opposite basketball season in the winter. Insofar as the association limits student-athletes to participate in one sport per season, a female would be forced to choose a sport due to reclassification while a male would not have to so. The court denied the association's motions for summary judgment since there were questions of fact as to whether member schools, all public and federally funded, ceded sufficient controlling authority to the association to make it a recipient under title IX, whether its scheduling practices were deliberately indifferent to the rights of females, and whether it was a state actor under section 1983 for the purposes of the Equal Protection claim.[25]

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[22] Smith v. NCAA, 266 F.3d 152 [157 Educ. L. Rep. 491] (3d Cir. 2001).

[23] Landow v. Sch. Bd. of Brevard County, 132 F. Supp.2d 958 [151 Educ. L. Rep. 909] (M.D. Fla. 2000).

[24] Communities for Equity v. Mich. High Sch. Athletic Ass'n, 137 F. Supp.2d 910 [153 Educ. L. Rep. 245] (S.D. Mich. 2001).

Former members of a defunct men's wrestling team in North Dakota filed a title IX suit against their university, claiming that officials cut the program for gender equity compliance reasons. University officials argued that budgetary reasons were the primary motivation for cutting the sport but conceded that gender equity was taken into consideration. In granting the university's motion for summary judgment, the federal trial court applied the substantial proportionality standard of title IX's policy guidance, according to which athletic programs must effectively accommodate the interests of both sexes when participation opportunities are provided in substantial proportionality to their respective enrollments in the student body.[26] The court reflected that even with the elimination of wrestling, men were still substantially over-represented in athletic programs.

A private company in Illinois which sponsored a girls' amateur ice hockey team sued the state amateur hockey association, a federally tax-exempt organization which served as the only governing board for amateur hockey in the state. The suit alleged that the administration of girls' hockey, particularly with regard to its competitive classification system and the sports' promotion, violated title IX by discriminating on the basis of gender. A federal trial court dismissed the title IX complaint against the association, rejecting the claim that since federally assisted educational institutions were members of the association and ceded controlling authority to it, it was a recipient of federal aid under title IX.[27] The court offered that the association was not subject to administrative enforcement action by the OCR and that its federal tax-exempt status did not make it a recipient of federal funds.

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[25] Alston v. Va. High Sch. League, 144 F. Supp.2d 526 [155 Educ. L. Rep. 205] (W.D. Va. 1999).

[26] Chalenor v. Univ. of N.D., 142 F. Supp.2d 1154 [154 Educ. L. Rep. 813] (D.N.D. 2000).

[27] Johnny's Icehouse v. Amateur Hockey Ass'n of Ill., 134 F. Supp.2d 965 [152 Educ. L. Rep. 647] (E.D. Ill. 2001).

Tort

During the past year, there were thirty sports-related tort cases. The first twelve cases focused on intentional torts. Of the remaining twenty-seven negligence cases, twenty involved participants, three concerned spectators, and four dealt with individuals who were neither participants nor spectators.

Intentional

Sexual Assault and Harassment

In the first of five cases on sexual assault and harassment, after a male middle school physical education teacher in Georgia was charged, tried, and convicted of six counts of child molestation and one count of criminal attempt to commit the same, three students sued the teacher, principal, and school board, alleging violations of title IX, section 1983, and state tort law. Although a jury found the teacher civilly liable for $500,000 in compensatory damages and $100,000 in punitive damages, a federal trial court granted the board's motions for summary judgment. On further review, the Eleventh Circuit affirmed that there was insufficient evidence to prove that school officials actually knew of the molestation since they never received such a report. The court was of the opinion that one student's complaint to the principal that the teacher touched her buttocks while playing touch football in an after school physical education class was insufficient to alert him to the molestation. Even if the principal had been charged with notice, the court was not satisfied that his actions in directing an investigation of the teacher and removing the teacher from the after school class amounted to deliberate indifference.[28]

The Eighth Circuit affirmed that a school board in Nebraska and its superintendent were not liable for the sexual molestation of a student in Texas by one of their former teachers/coaches. The board reached a confidential settlement agreement with the teacher rather than dismissing him outright for molesting a student, in part because it did not want to spend legal fees on the matter and, thus, gave him a neutral letter of recommendation. The court agreed that even though the student suffered a constitutional injury at the teacher's hands, the settlement agreement, while reckless, was not so deliberately indifferent to his rights as to "shock the conscience."[29] The court affirmed on the title IX claim, reasoning that the board, in no longer exercising control over the teacher in Texas, and not exercising any control over the student victim, did not have the requisite control over the teacher's actions or the context in which the assault occurred.

In Connecticut, a basketball player sued a school board and its members individually, alleging that a male coach sexually harassed her in violation of title IX, section 1983, and state laws. The student claimed that officials refused to do anything about the coach's continuing and persistent pattern of offensive remarks and inappropriate physical contact that ultimately led her to quit the team, transfer to another school, and receive ongoing medical care and psychological treatment. The federal trial court declared that the weight of authority precluded title IX liability against individual board members.[30] Insofar as the student's section 1983 claims were based on the same facts as her title IX charge, the court dismissed the allegations against the board and district as a whole since constitutionally based claims are subsumed by the comprehensive enforcement scheme of title IX. However, the court did allow the student's section 1983 claims against school officials in their individual capacities to proceed.

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[28] Davis v. DeKalb County Sch. Dist., 233 F.3d 1367 [149 Educ. L. Rep. 376] (11th Cir. 2000).

[29] Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773 [153 Educ. L. Rep. 600] (8th Cir. 2001).

Where a female cross-country athlete completed her eligibility at a university in Ohio and wished to train there in preparation for Olympic competition, she claimed to have entered into an unwritten agreement with an assistant coach to do so in exchange for her serving as a volunteer assistant. When she rejected the assistant coach's romantic advances, the athlete claimed that she was prohibited from training with the team. The athletic director reprimanded the coach but rejected the athlete's request to be allowed to continue training with the team. Even though the university's dispute resolution office agreed that the coach violated its sexual harassment policy and recommended that she be allowed to resume training, the athlete chose not to do so and sued the university, coach, and athletic director for quid pro quo sexual harassment in violation of title IX and section 1983; she amended the complaint to include claims of hostile environment sexual harassment. A jury in a federal trial court exonerated the coach on the section 1983 quid pro quo claim while granting summary judgment motions for the university on the quid pro quo claim and the coach on the hostile environment charge. On further review, the Sixth Circuit affirmed for the university on the title IX quid pro quo claim, asserting that since the coach was fully exonerated, there was no underlying sex discrimination for which the university could be held liable under title IX.[31]

A student manager alleged that she was sexually harassed by a coach over a period of three months and that even though she reported his conduct to the head football coach, a teacher, a counselor, and school administrators, their failure to stop the offensive behavior caused her to leave school and relapse into bulimia. In response to the student's section 1983 and state law claims against the board and school officials, a federal trial court in Pennsylvania dismissed the state claims against the board as well as the negligent hiring and supervision claims against the coach.[32] The court refused to dismiss the section 1983 claims in deciding that they were not subsumed by title IX. The court concluded that the coach was not entitled to qualified immunity since his intentional actions exceeded all possible bounds of decency and that other officials were not entitled to immunity since they failed to take action to prevent the harassment.

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[30] Norris v. Norwalk Pub. Schs., 124 F. Supp.2d 791 [150 Educ. L. Rep. 176] (D. Conn. 2000).

[31] Klemencic v. Ohio State Univ., 263 F.3d 504 [156 Educ. L. Rep. 779] (6th Cir. 2001).

[32] DiSalvio v. Lower Merion High Sch. Dist., 158 F. Supp.2d 553 [156 Educ. L. Rep. 899] (E.D. Pa. 2001).

Defamation

In New York, a soccer coach at a university sued a former player and his father for defamation and intentional infliction of emotional distress. The coach's suit arose over the father and son's attempts to have him fired in a dispute over playing time and the coach's attempts to motivate the player to get into competitive physical condition. The alleged defamatory actions centered on published, unsubstantiated accusations of the coach's inappropriate sexual activities with two female students. A federal trial court granted the defendants' motion for summary judgment on two claims since the coach did not create a genuine issue of material fact as to whether the statements had actually been made and on a third since the defendants' conduct was not sufficiently extreme, outrageous, indecent, atrocious, and intolerable to support a claim for intentional infliction of emotional distress.[33] Even so, the court denied motions on the remaining claims that the defendants wrote to the university's president that the coach had a history of sexual misconduct, that they were involved in the writing and wide publication of a letter stating that the coach was dismissed from his previous position for sexual harassment, and that they participated in publishing an anonymous letter that accompanied the immediately aforementioned letter. The court rejected the defendants' requests for qualified privilege since the letters were written with malice and published excessively.

An appellate court in Texas affirmed that a television station that broadcast portions of a videotape made by a high school band director to discover who was going through students' belongings, but which showed female students changing clothes, did not subject the television station to liability for invasion of privacy, defamation, and intentional infliction of emotional distress. The court agreed that the complaint was not actionable because the broadcasts, which were on a matter of legitimate public concern, neither defamed the students nor invaded their right to privacy.[34]

Corporal Punishment

A member of a varsity football team in Georgia unsuccessfully sued his coach, principal, superintendent, and school board, claiming that his due process right to be free from excessive corporal punishment was violated when the coach disciplined him for getting into a fight with a teammate. On further review, the Eleventh Circuit vacated and remanded, holding that the coach's striking the student with a metal weight, which resulted in the loss of an eye, was corporal punishment that was so excessive and predictably injurious that it supported a claim for violating his right to substantive due process.[35]

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[33] James v. DeGrandis, 138 F. Supp.2d 402 [153 Educ. L. Rep. 618] (W.D.N.Y. 2001).

[34] Doe v. Mobile Video Tapes, 43 S.W.3d 40 [153 Educ. L. Rep. 806] (Tex. App. 2001).

Parents in Texas sued a teacher and school board for violating their son's due process rights after he was injured as a result of an excessive exercise imposed as corporal punishment in a physical education class. The parents then challenged a granted of summary judgment in favor of the defendants. The Fifth Circuit affirmed that the punishment was not a due process violation since state law provided adequate remedies.[36] Further, the court declined to exercise jurisdiction over the state law claims which it dismissed without prejudice.

A middle school student who had no apparent history of disciplinary problems was subjected to corporal punishment by a substitute physical education teacher in violation of a board policy which permitted it only as a last resort. In a suit against the board alleging negligence, assault and battery, and intentional infliction of emotional distress, a trial court granted the district's, but not the teacher's, motion for summary judgment and so entered a judgment against her for $5,000 and deposition costs. On further review, an appellate court in Alabama affirmed the judgment against the teacher in her individual capacity for the intentional torts of assault and battery.[37] The court rejected the teacher's claim of discretionary function immunity since there was sufficient evidence that her complete disregard for the corporal punishment policy gave rise to legal malice.

Section 1983

The administrator of the estate of a middle school student, who died as a result of breaking his neck when hitting his head on a wall during a basketball tryout, sued the school board and district officials. A federal trial court in Ohio, in limiting its discussion to the section 1983 claim that the student's death violated his constitutionally protected interest in personal bodily integrity, dismissed in favor of the defendants.[38] The court observed that school officials did not have a Fourteenth Amendment duty to provide for the student's safety during the tryout on what was, in essence, a state-law negligence claim.

Emotional Distress/Race Discrimination

When a high school band in Georgia stopped to eat on its way back to school after performing at a football game, a white cook made disparaging remarks about its African American members and refused to serve the group.

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[35] Neal v. Fulton County Bd. of Educ., 229 F.3d 1069 [148 Educ. L. Rep. 86] (11th Cir. 2000).

[36] Moore v. Willis Indep. Sch. Dist., 233 F.3d 871 [149 Educ. L. Rep. 337] (5th Cir. 2000).

[37] Hinson v. Holt, 776 So. 2d 804 [151 Educ. L. Rep. 343] (Ala. Civ. App. 1998).

[38] Pope v. Trotwood-Madison City Dist. Bd. of Educ., 162 F. Supp.2d 803 [157 Educ. L. Rep. 602] (S.D. Ohio. 2000).

The cook called the police and claimed that since he would not serve misbehaving students, he would close the restaurant. Even though the police saw that the students were behaving properly, they and their chaperone did as they were asked and left without incident so that the restaurant could reopen. The chaperone and seven students sued the cook and restaurant company for racial discrimination and the cook for intentional infliction of emotional distress. A federal trial court dismissed the claim against the cook prior to trial and ruled in favor of the restaurant on the race discrimination claim, but entered a judgment on behalf of the plaintiffs on the intentional infliction claim, awarding them $5,000 in compensatory damages and $400,000 in punitive damages. In reviewing the restaurant's post-trial motion for judgment as a matter of law, the Eleventh Circuit was of the view that since the cook acted within the scope of his employment, his behavior could be imputed to the company.[39] The court thus agreed that the jury properly determined that the cook's misconduct was sufficiently willful to support a claim on punitive damages against the restaurant.

Negligence

Participants

In a unique case among the first four disputes on duty of care, where a player accepted a five-year scholarship to play college basketball, college officials revoked their offer when they learned that a class he took on the advice of a counselor did not meet the NCAA's core course requirements. The student unsuccessfully sued the school board for negligence and negligent misrepresentation, claiming that the officials having breached their duty to provide him with accurate information regarding courses was the proximate cause of the loss of his scholarship. On further review of a grant of summary judgment in favor of the board, the Supreme Court of Iowa reversed and remanded.[40] The court indicated that the case was not one for traditional educational malpractice that is overwhelmingly rejected since it did not reach into the teaching and learning process. Rather, the court treated this as a case of negligent misrepresentation. The court wrote that the board and the counselor owed the student a duty of reasonable care to provide him with accurate information about NCAA-approved courses, extending the negligent misrepresentation claim since the counselor was in the business of providing information to others. The court did not recognize the negligent misrepresentation for failure to submit the class claim since this tort applies only to the disclosure of information, not the failure to submit the same.

Where a high school football player in New York returned to competition after suffering a serious head injury, he filed a personal injury action against the state high school athletic association, alleging that its failure to promulgate rules governing such a situation was the proximate cause of his harm. In reversing the denial of the association's motion for summary judgment, an appellate court contended that the promulgation of such rules was not within the function or expertise of the association.[41] The court added that since promulgating such rules was the responsibility of the school board and medical personnel who examined or treated such injuries, the association did not owe the student a duty of care.

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[39] Middlebrooks v. Hillcrest Foods, 256 F.3d 1241 [155 Educ. L. Rep. 1000] (11th Cir. 2001).

[40] Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115 [153 Educ. L. Rep. 779) (Iowa 2001).

In North Carolina, a case considered whether university officials owed an affirmative duty of care to a female student-athlete on a cheerleading squad who suffered permanent brain injury when she fell during a pyramid stunt. When the student filed a negligence claim, both the deputy commissioner of the state industrial commission and the full commission entered judgments in favor of the university. On further review, an appellate court reversed in favor of the student and remanded for reconsideration on the ground that university officials owed her a duty of care.[42] The court focused on the special relationship that existed between officials and the cheerleaders, who acted as official representatives of, and received benefits from, the university. The court acknowledged that since officials had a considerable degree of control over various aspects of the cheerleader's lives, they had an affirmative duty to provide a degree of care that a reasonable and prudent person would have exercised under the same or similar circumstances.

A seventeen-year-old female who took university classes while still in high school enrolled in a week-long preseason soccer camp on campus and stayed in a university-owned residence hall. One evening, after attending a fraternity party, a man she met walked her back to her dormitory and sexually assaulted her. The student, with her parents, filed negligence, negligent infliction of emotional distress, and breach of implied contract claims against the university. A trial court granted the university's motion for summary judgment on the negligence and breach of implied contract claims. On further review, the Supreme Judicial Court of Maine affirmed that since the parents failed to complete the residence hall application, there were no specific contract terms to which either party agreed.[43] The court reinstated the negligence claim in positing that since the student was a business invitee, university officials owed her a duty of care where assault could have been reasonably foreseeable in light of security measures that they had undertaken.

Five cases, only the first of which was not from New York, dealt with the standard of care owed to an injured plaintiff and/or whether a defendant breached a duty by failing to provide the proper standard of care. A high school football player brought a negligence suit against his school board when his coaches, both of whom had teaching certificates and coaching endorsements, allowed him to return to a game in which he suffered an earlier head injury. In reversing a dismissal in favor of the school board, the Supreme Court of Nebraska explained that the proper standard of care against which coaches should be measured was that of the reasonably prudent person with a teaching certificate and a coaching endorsement.[44] In deciding that, since individuals with coaching endorsements received specialized training in athletic injuries (including head injuries) and should be held to a heightened standard of care, the court remanded for a consideration of whether the coaches acted in accordance with this heightened standard.

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[41] Serrell v. Connetquot Cent. High Sch. Dist. of Islip, 721 N.Y.S.2d 107 [151 Educ. L. Rep. 538] (N.Y. App. Div. 2001).

[42] Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 [152 Educ. L. Rep. 336] (N.C. App. 2001).

[43] Stanton v. Univ. of Me. Sys., 773 A.2d 1045 [155 Educ. L. Rep. 566] (Me. 2001).

In the first of three standard of care cases from New York involving playgrounds, a first-grade student was injured as he tripped on a crack in a public sidewalk that was used as part of a playground. His mother filed a negligence action against the school board. On further review of the denial of the board's motion for summary judgment, an appellate court reversed in remarking that the board properly exercised the same standard of care as that of a reasonably prudent parent.[45] The court relied on evidence that the child's mother testified that she thought it normal for children to play on the sidewalk and had not instructed her son otherwise.

When an appellate court in New York agreed that a middle school student was a willing and active participant in an incident in which his friend threw a stick, striking the plaintiff in the eye, it reversed the denial of a board's motion for summary judgment.[46] The court was of the opinion that granting the board's motion was warranted since it sustained its burden of establishing that school officials had no actual or constructive knowledge of prior similar behavior by the students.

Also in New York, a second-grade student was injured when she crossed a piece of playground equipment with a chain link walkway and her foot became entangled in the chains. Her parents unsuccessfully sued the school board and manufacturer of the equipment. On further review, an appellate court reversed a grant of summary judgment in favor of the board on the basis that the plaintiffs raised a triable issue of fact as to whether school officials, by allegedly failing to instruct students on how to use the equipment, breached their ordinary duty of parental care.[47] However, the court affirmed the grant of judgment in favor of the manufacturer, agreeing that its alleged failure to conform the design of the playground to Consumer Product Safety Commission standards, which are not mandatory, did not raise a triable issue of fact.

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[44] Cerny v. Cedar Bluffs Junior/Senior High Sch., 628 N.W.2d 697 [155 Educ. L. Rep. 827] (Neb. 2001).

[45] Santana v. City of N.Y., 722 N.Y.S.2d [152 Educ. L. Rep. 237] (N.Y. App. Div. 2001).

[46] Janukajtis v. Fallon, 726 N.Y.S.2d 451 [154 Educ. L. Rep. 912] (N.Y. App. Div. 2001).

[47] Merson v. Syosset Cent. Sch. Dist., 730 N.Y.S. 2d 132 [156 Educ. L. Rep. 1276] (N.Y. App. Div. 2001).

The final standard of care case involved a student in a Catholic school in New York who was injured when she fell onto a wooden gymnasium floor as a spotter failed to catch her while she performed a stunt in a school-sponsored cheerleading competition. On further review of a grant of summary judgment in favor of the school in the student's negligence action, an appellate court affirmed that her admitting that the coach delegated decisions about the performance of cheerleading routines to the team captain raised a genuine issue of material fact as to whether officials breached their supervisory duty by unreasonably increasing the risk of harm.[48] The court decreed that the spotter's failure to catch the cheerleader was not an intervening or superseding cause of her injury since it was foreseeable that this might have happened.

In the first of two cases dealing with assumption of risk from New York, a teenaged equestrienne with roughly seven years of riding experience brought a personal injury suit against the owner of a riding academy over injuries she suffered when her horse slipped and fell while she remained mounted. On further review of a grant of summary judgment in favor of the academy, an appellate court affirmed that the defendant presented sufficient evidence that the riding area was properly cared for and so established a prima facie freedom from negligence defense.[49] The court pointed out that the experienced equestrienne understood, appreciated, and voluntarily assumed the risks inherent in riding.

A high school volleyball player in New York filed a negligence action against her school board to recover for injuries she suffered while warming up for a game. In affirming a denial of the board's motion for summary judgment, an appellate court reasoned that even though the student assumed the inherent risks associated with playing volleyball, she raised a genuine issue of material fact as to whether she assumed the concealed or increased risks associated with warming up for the game in an allegedly hazardous area.[50]

Of the eight cases addressing immunity under statutory or judicial provisions, three addressed students' injuries under the recreational use exception of the Kansas Tort Claims Act. Briefly, the exception immunizes governmental entities or its employees for injuries occurring on governmental property intended or permitted for use as parks, playgrounds, or open areas unless the injury is proximately caused by the entity's or employee's gross or wanton negligence.

In the first of two cases originating in the same school district, the issue of whether the recreational use exception violated federal and state equal protection clauses reached the Supreme Court of Kansas in a dispute over the death of a high school football player due to heat-related injuries on the first day of practice. In a negligence and gross negligence case against the school board and head football coach, a trial court was convinced that applying the recreational use exception violated both equal protection clauses. On further review, the high court reversed in noting the facially disparate treatment accorded to plaintiffs by the exception based on the nature and use of the property, but maintained that this was rationally related to the state's legitimate purpose of being able to provide public recreational facilities without the constant threat of litigation for injuries suffered on this property.[51] As such, the court did not reach the question of whether discretionary function immunity applied since the recreational use exception answered the question of immunity for ordinary negligence. The court halted the ordinary negligence claim but remanded the gross negligence charge to trial.

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[48] Traficenti v. Moore Catholic High Sch., 724 N.Y.S.2d 24 [153 Educ. L. Rep. 347] (N.Y. App. Div. 2001).

[49] Papa v. Russo, 719 N.Y.S.2d 723 [150 Educ. L. Rep. 911] (N.Y. App. Div. 2001).

[50] Gilbert v. Lyndonville Cent. Sch. Dist., 730 N.Y.S.2d 638 [157 Educ. L. Rep. 283] (N.Y. App. Div. 2001).

A middle school student who suffered compound fractures of both bones in one forearm as he used a gymnastics springboard to attempt to touch a basketball rim at the end of a physical education class unsuccessfully sued the school board for negligence. On remand from the state supreme court, in a dispute over whether the recreational use exception in the state tort claims act applied to school gymnasia, a trial court granted the board's motion for summary judgment, rejecting the student's argument that its interpretation of the recreational use exception denied his rights under the state and federal due process and equal protection clauses. On further review, an appellate court again affirmed in concluding that the recreational use exception had a rational relationship to the school's legitimate interest of opening its facilities to the public without the fear of litigation due to injuries.[52] The court further rebuffed the student's argument that the exception violated his due process rights by preventing him from seeking redress for a teacher's simple negligence since the argument was not properly before it and, even if it were, his attorney failed to establish that there was ever such a remedy at common law.

In the final case from Kansas involving recreational use immunity, an appellate court considered the exception where a high school wrestler severely injured a knee when competing against a former teammate in the school's wrestling room. Faced with the question of whether the recreational use exception applied, the court reversed a denial of summary judgment and commented that since the wrestling room, as well as the adjacent gymnasium and weight rooms, was used more than incidentally for recreational purposes open to the general public; the fact that they were not outdoors did not nullify the application of the recreational use exception.[53]

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[51] Barrett v. Unified Sch. Dist. No. 259, 32 P.3d 1156 [157 Educ. L. Rep. 917] (Kan. 2001).

[52] Jackson v. Unified Sch. Dist. No. 259, 31 P.3d 989 [157 Educ. L. Rep. 346] (Kan. Ct. App. 2001).

[53] Wright v. Unified Sch. Dist. No. 379, 14 P.3d 437 [149 Educ. L. Rep. 897] (Kan. Ct. App. 2000).

A father challenged a grant of summary judgment in favor of a school board when his fourth-grade son suffered permanent facial injuries as he fell while attempting to jump over a rope stretched between two poles in a physical education class. An appellate court in Illinois reversed and remanded insofar as the allegations against the board for not keeping its property in a reasonably safe condition were not subject to the state's tort claims act.[54] In addition, the court believed that material issues of fact remained as to whether the teacher who purchased the poles at a garage sale had the discretionary power to do so and, if so, whether this was an exercise of that authority or mere negligence.

Where students in a high school physical education class were given a choice of running or in-line skating, one who chose the latter unsuccessfully sued the school board for negligence after he broke two bones while attempting to traverse a wooden gym floor. On further review, an appellate court reversed a dismissal in favor of the board.[55] The court offered that even though the board's permitting the teacher to allow students to use in-line skates was an exercise of discretion, it was not immune from liability since it had an independent affirmative duty to provide students with equipment to protect them from serious injury.

In a playground case from Minnesota, a student who was injured when he fell from a pile of snow onto a piece of ice filed a negligence action against the school board and officials. An appellate court affirmed the denial of the defendants' motion for summary judgment in agreeing that the board failed to present adequate proof that its placing snow on the playground was a planning-level decision that was entitled to statutory immunity.[56]

Where a cheerleader was injured in practice as she fell attempting a shoulder dismount, an appellate court in Pennsylvania affirmed a grant of summary judgment in favor of the school board.[57] The court agreed that even though assumption of risk was improvidently accepted at trial since it could not be established that the cheerleader expressly or contractually assumed the risk, this was a harmless error. The court relied on the fact that the board's alleged negligent conduct of failing to provide gymnasium mats did not fall within the real property exception of the state's tort claims act because gymnasium mats are in no way affixed to the real property.

In another cheerleading case focusing on immunity, where a high school cheerleader in Ohio aggravated a previous back injury in attempting a back bend in preparation for an upcoming competition, she alleged that she was pressured into prematurely performing the maneuver when her coach told her she would not be able to compete if she did not do so. In the student's negligence action against the school board and cheerleading coach, an appellate court affirmed a grant of summary judgment in favor of the board but reversed as to the coach.[58] In applying a three-tiered analysis to the board, the court discerned that it was a covered political subdivision under the state's general immunity statute; that since the accident took place at a local department store, the exception to immunity resulting from the maintenance of governmental property was inapplicable; and that the proprietary function exception to immunity was inapplicable since the organization and operation of a school-sponsored athletic team was a governmental function for which the school district was immune from liability. With regard to the coach, the court ascertained that the cheerleader raised a genuine issue of material fact as to whether his intimidation rose to the level of recklessness necessary to defeat his immunity.

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[54] Catberro v. Naperville Sch. Dist. No. 203, 739 N.E.2d 115 [150 Educ. L. Rep. 789] (Ill. App. Ct. 2000).

[55] Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15, 740 N.E.2d 47 [150 Educ. L. Rep. 809] (Ill. App. Ct. 2000).

[56] Fear v. Indep. Sch. Dist. 911, 634 N.W.2d 204 [157 Educ. L. Rep. 323] (Minn. Ct. App. 2001).

[57] Rieger v. Altoona Area Sch. Dist., 768 A.2d 912 [151 Educ. L. Rep. 982] (Pa. Commw. Ct. 2001).

Where a high school football player in New York suffered a serious back injury when he was hit from behind by a teammate in practice, the trainer diagnosed the injury as a pulled muscle and one of the three coaches who allegedly witnessed the collision directed him to file an injury report. Although the injury prevented the student from participating fully in both football and wrestling, he was not first examined by a doctor until six months later and underwent spinal fusion surgery thirteen months after being hurt. Twenty months after the injury, the student, through his father, unsuccessfully applied for leave to file a notice of late claim. On further review, an appellate court reversed in declaring that under state law, a court has the discretion to extend the statute of limitations an additional year or until a minor plaintiff's eighteenth birthday.[59] In recognizing that the trial court abused its discretion in denying the application for leave, the panel observed that the school board would not have been prejudiced by granting it since officials were on notice as to the nature of the claim and its essential facts.

Spectators

In the first of three cases involving injuries to spectators, a fan at a high school basketball game sustained serious injuries when a fight broke out during the game and he was thrown from the stands onto the gymnasium floor. Contrary to regulations promulgated by the state high school activity association, there was only one, rather than the required two, police officers on duty since the one who was present was confident that he could handle the situation by himself. In the plaintiff's negligence suit against the school board, a trial court awarded him $45,000 in damages. In reversing and remanding, the Supreme Court of Mississippi held that even though state law immunized governmental entities and their employees for performing or failing to perform a discretionary duty, the issue was not whether the police officer's judgment in allowing the game to proceed without two officers was discretionary.[60] Instead, the court was of the opinion that recent case law made it clear that public school officials are responsible for providing a safe environment and must use ordinary care in doing so. The panel remanded on the issue of apportionment of damages since the trial court failed to consider the issue.

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[58] Summers v. Slivinsky, 749 N.E.2d 854 [154 Educ. L. Rep. 659] (Ohio Ct. App. 2001).

[59] Welch v. Bd. of Educ. of Saratoga Cent. Sch. Dist., 731 N.Y.S.2d 94 [157 Educ. L. Rep. 808] (N.Y. App. Div. 2001).

A woman sued a school board and two maintenance workers for negligence after sustaining head injuries when she slipped and fell on an icy patch on the playground/parking area outside the school gymnasium after an athletic contest. A trial court granted the defendants' motion for summary judgment, finding as a matter of law that the woman voluntarily assumed the risk of falling. On further review, the Supreme Court of South Dakota reversed and remanded on the ground that, except in the rarest of circumstances, assumption of risk is a question of fact properly submitted to a jury.[61] Insofar as genuine issues of material fact existed as to whether the spectator had the time, experience, or knowledge to consider whether there were reasonable alternatives (e.g., to park in a different area and perhaps take a safer path to the gymnasium), the court thought that she raised a question of fact for a jury on the assumption of risk issue.

In New York, a man who sustained injuries when he fell while descending a set of bleachers at a high school softball field prevailed in his negligence action against a city and school board. On further review, an appellate court reversed and ordered a new trial.[62] The court determined that the city and the school board were required to answer to a negligence rather than a negligence per se complaint, which essentially arises from the violation of a statute and requires no argument or proof. According to the court, since the building code was part of a local ordinance, it should not have been given the same status as a legislative enactment.

Others

In Louisiana, a man died as a result of being struck by a bicycle operated by a high school football coach. The coach, who was en route to school on a Sunday to view game films, was peddling the wrong way down a one-way street when the accident occurred. When the deceased man's wife unsuccessfully sued the school board, coach, and the board's insurer for negligence, a trial court rejected the motion to dismiss on the ground that the coach was not acting within the scope of his employment; the coach filed a cross-claim alleging that he was acting within the scope of his duties, thereby insulating himself from individual liability. On further review, an appellate court reversed in positing that the coach, in traveling to school to view the films, was not acting within the scope of his employment, but was merely traveling to his normal workplace on a weekend to provide services for the school.[63]

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[60] Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911 [154 Educ. L. Rep. 716] (Miss. 2001).

[61] Petry v. Rapid City Area Sch. Dist., 630 N.W.2d 705 [155 Educ. L. Rep. 1356] (S.D. 2001).

[62] Elliott v. City of N.Y., 724 N.Y.S.2d 397 [153 Educ. L. Rep. 751] (N.Y. 2001).

In a case from Minnesota, the Eighth Circuit examined a dispute where a motorist was injured in a collision with an automobile driven by a high school football player who was traveling between two schools in different districts to attend practice since the boards operated a cooperative football program. In affirming a grant of summary judgment in favor of both districts, the court ruled that the sending school, by virtue of the cooperative agreement, had no special relationship with or duty of care to the motorist.[64] Similarly, the court affirmed that since the student's home district did not have a special relationship with the injured motorist, it was not responsible for protecting him from unforeseeable harm, especially since there were no indications that the student was an unsafe driver.

Where a contractor was killed when the trench in which he was installing drainage pipe collapsed, his widow brought a wrongful death action against a school board, its architect, and others. The Supreme Court of New Jersey affirmed that the widow's attorney failed to establish that either the board or architect breached a duty of care by failing to supervise the contractor's company.[65] However, the court decided that the widow was entitled to attempt to discover evidence concerning related projects involving the board and architect that possibly had a bearing on their general supervisory responsibilities. In remanding, the court relied on evidence that the board's failure to supply the correct pipe breached its contractual duty of care—a failure that was the proximate cause of the contractor's death.

A student with cerebral palsy unsuccessfully sued her school board to recover for injuries she sustained while working at a concession stand during a high school basketball game when she slipped and fell on steps that were wet from snow. An appellate court in Illinois reinstated the student's claim.[66] The court acknowledged that statutory immunity, based on an injury caused by the effect of weather, was inapplicable because the student's injuries were caused by a teacher's exercise of control over her activities rather than the weather itself.

Employment

Thirteen sports cases during the past year addressed employment issues. Eight of these cases examined contract disputes, one focused on a labor dispute, three concentrated on gender discrimination, and the final case reviewed age discrimination.

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[63] Fasullo v. Finley, 782 So. 2d 76 [152 Educ. L. Rep. 895] (La. Ct. App. 2001).

[64] Gylten v. Swalboski, 246 F.3d 1139 [153 Educ. L. Rep. 35] (8th Cir. 2001).

[65] Pfenninger v. Hunterdon Cent. Reg'l High Sch., 770 A.2d 1126 [153 Educ. L. Rep. 652] (N.J. 2001).

[66] Manuel v. Red Hill Cmty. Unit Sch. Dist. No. 10 Bd. of Educ., 754 N.E.2d 448 [156 Educ. L. Rep. 1242] (Ill. App. Ct. 2001).

Contract Disputes

The first of three contract disputes cases examined extra duty assignments. A high school teacher who served as a tennis coach during the fall and spring received only one extra duty stipend while coaches whose seasons were contained within one semester and/or coached multiple sports received additional stipends. Although a school board policy required an initial complaint to be filed not later than fifteen days after an event giving rise to one occurred, the teacher did not file her charge (that the stipend policy was inequitable) until well after the time expired. On further review of several levels of administrative review and a trial court's rejection of the teacher's complaint, an appellate tribunal in Texas affirmed that her claim was without merit.[67] The court rejected the teacher's argument that the school board waived the fifteen-day time limit because it listened to her argument and accepted a packet of materials which she submitted. As the board listened to the complaint, as required by policy, but did not admit evidence or take testimony, the court was not convinced that it conducted a formal hearing which would have amounted to a waiver of the time limit.

The second and third extra duty cases addressed whether such assignments are property interests that require due process when they are terminated. The Tenth Circuit permitted a high school football coach in Utah to go to trial on the issue of whether he had a property interest in his coaching position. While conceding that the coach's property interest could not be based on his continuing contract as a teacher or on his collective bargaining agreement, the court contended that a material question of fact existed as to whether coaches served at the discretion of the principal or whether there was an unwritten policy that they can be dismissed only for cause.[68]

In a case of first impression, the Supreme Court of Idaho upheld a grant of summary judgment in favor of a teacher who claimed that her school board's nonrenewal of her extra duty coaching assignments violated due process.[69] The court agreed that since the reduction of the teacher's compensation under a master union contract covered both classroom and extra duty assignments, she had a property interest in extra duty assignments. In addition to asserting that the nonrenewal of these assignments without notice and a hearing violated the teacher's procedural due process rights, the court affirmed awards of reinstatement and back pay.

The first of two cases focusing on breach of contract was filed by an employee of a community college who sued school officials for breach of contract and wrongful discharge as well as deprivations of equal protection and due process in claiming that he was wrongfully denied his jobs as head women's basketball coach and coordinator of student retention. A federal trial court in Iowa granted the college's motion for summary judgment on all complaints.[70] In disposing of the breach of contract and wrongful discharge claims, the court reasoned that while the plaintiff raised issues as to whether he was discharged from his two duties, they did not affect the outcome since there was undisputed evidence that he was reinstated as retention coordinator while he was suspended with pay from coaching, but that he voluntarily resigned from both jobs. In disposing of the due process claims, the court referred to the language of the basketball contract in explaining that the plaintiff did not raise a factual issue as to whether he had a property interest in coaching since, even assuming that he did, he voluntarily resigned.

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[67] Grigsby v. Moses, 31 S.W.3d 747 [149 Educ. L. Rep. 274] (Tex. App. 2000).

[68] Kingsford v. Salt Lake City Sch. Dist., 247 F.3d 1123 [153 Educ. L. Rep. 68] (10th Cir. 2001).

[69] Farner v. Idaho Falls Sch. Dist. No. 91, 17 P.3d 281 [150 Educ. L. Rep. 957] (Idaho 2000).

In Texas, a women's basketball coach sued for breach of contract and fraud when his contract was terminated, apparently at the end of his first year of employment. After a trial court granted the university's motion for summary judgment, an appellate court affirmed in rejecting the coach's promissory estoppel counter-defense to the university's statute of frauds defense.[71] The coach urged a promissory estoppel defense in light of oral promises he received from unnamed university administrators that his contract would be two years long. The court stated that a promissory estoppel defense was available only where the terms of an agreement were reduced to writing, but not yet signed. The court reversed and remanded in favor of the coach on the fraud claim, decreeing that the university was not able to prove that the injury for which he sought redress under the breach of contract claim, namely economic loss or benefit of the bargain, was the same for which he sought redress on the fraud charge.

A basketball coach sued his university's athletic director and others, claiming that he was fraudulently induced to sign a contract that would employ him as interim head coach for one year and that he then would be eligible to apply for the permanent position with the stipulation that he would be the first assistant coach if he were not offered the head job. When the coach was not offered the head job, a trial court dismissed all of his claims except for those against the athletic director. Subsequently, a jury awarded the coach $200,000 in compensatory and $150,000 in punitive damages. On further review, the Supreme Court of Alabama affirmed but thought that the punitive damage award was excessive.[72] The court rejected the athletic director's discretionary function immunity defense, maintaining that he did not exercise discretion in contractual matters since they were left to the president and that even if he were protected, his misrepresentations exceeded his authority and abrogated his immunity. The court added that the coach's financial situation and mental anguish justified the compensatory damage award but the punitive damage award was excessive since it would have left the athletic director with a significantly negative net worth.

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[70] Kish v. Iowa Cent. Cmty. Coll., 142 F. Supp.2d 1084 [154 Educ. L. Rep. 795] (N.D. Iowa 2001).

[71] Sonnichsen v. Baylor Univ., 47 S.W.3d 122 [154 Educ. L. Rep. 989] (Tex. App. 2001).

[72] Williams v. Williams, 786 So. 2d 477 [155 Educ. L. Rep. 960] (Ala. 2000).

An appellate court in Georgia upheld a school board's dismissal of its media and technology coordinator for videotaping a girls' locker room.[73] The court held that the school's principal (who was also the wife of the plaintiff) directed that a video camera be set up in the locker room and, in response to an earlier theft, be aimed at the door to apprehend a possible thief. In aiming the camera at an area including the one where female players and cheerleaders changed clothes, storing the tapes, and failing to erase the tapes' contents within two years, the court agreed that the plaintiff failed to follow the directive to erase the tape for two years.

The Seventh Circuit affirmed that a tenured physical education teacher in Illinois was not denied liberty and property interests when he was temporarily transferred after the death of one of his students.[74] The court maintained that the transfer did not violate the teacher's property interest since he was fully paid during the investigation. The court pointed out that statements made by school officials to the media after the teacher's dismissal did not violate his liberty interest since he failed to make a showing that he lost prospective employment opportunities.

Collective Bargaining/Labor Relations

A head athletic trainer sued his college, seeking overtime pay under the Fair Labor Standards Act (FSLA) for work performed in excess of forty hours per week. After a trial court granted the college's motion for summary judgment, the trainer sought further review. An appellate court in Kansas affirmed that the trainer, by virtue of his position and role in the management of a sports medicine program, was an administrative employee to whom the overtime provisions of the FSLA do not apply. Similarly, since the trainer was a "learned professional" by virtue of the advanced knowledge his administrative position required, and a "teacher professional" by virtue of his being a tenured instructor, the court was satisfied that the professional exemption to the FSLA overtime requirements precluded the overtime claim.[75]

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[73] Clinch County Bd. of Educ. v. Hinson, 543 S.E.2d 91 [152 Educ. L. Rep. 322] (Ga. Ct. App. 2000).

[74] Townsend v. Vallas, 256 F.3d 661 [155 Educ. L. Rep. 142] (7th Cir. 2001).

[75] Winkle v. Hutchinson Cmty. Coll., 18 P.3d 239 [151 Educ. L. Rep. 278] (Kan. Ct. App. 2000).

Discrimination

Gender

A white female in Alabama who worked in the athletic department of a community college but was twice passed over for promotion to athletic director sued the school and its president for gender discrimination under title VII and equal protection under section 1983, for violating the Equal Pay Act (EPA) and title IX, and for violating state law. A federal trial court denied the defendants' motion for summary judgment on the title VII failure to promote claim, rejecting their claim that the qualifications for the second opening required a person to be an administrator since it was first offered to, but rejected by, a chemistry instructor.[76] The court granted the defendants' motion for summary judgment on the title IX charge since it was precluded by the title VII claim. The court conceded that, as an arm of the state, the college (but not its president) was entitled to Eleventh Amendment immunity on the section 1983 equal protection claim. The court concluded that the college did not enjoy Eleventh Amendment immunity on the EPA claim insofar as Congress affirmatively intended to abrogate the states' immunity pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment.

In Michigan, a federal trial court was of the opinion that a female who applied for a job as head varsity basketball coach of a boys' team proffered a prima facie case under title VII when she was passed over in favor of a male with less experience.[77] The court observed that the female was already head coach of the girls' basketball team and that the school board chose not to hire her for the boys' team due to overlapping schedules. In denying the school board's motion for summary judgment, the court believed that a genuine issue of material fact existed as to whether the board had established a policy of not permitting the same person to coach two varsity sports with overlapping seasons.

A women's basketball coach with ten years of experience who served on a series of one-year contracts was dismissed, supposedly for poor competitive performance, difficulties in player relations, and problems with following NCAA regulations. Even though she was replaced by a female, the coach sued the university, its president, and the current and former athletic director, alleging wrongful termination and retaliation due to gender discrimination under title VII, title IX, and state law. The federal trial court in Delaware granted the defendants' motion to dismiss the title IX and state law claims as time barred and granted such a motion as to title VII since the ex-coach failed to present a prima facie case of gender discrimination under title VII.[78]

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[76] Morris v. Wallace Cmty. Coll.-Selma, 125 F. Supp.2d 1315 [150 Educ. L. Rep. 392] (S.D. Ala. 2001).

[77] Fuhr v. Sch. Dist. of Hazel Park, 131 F. Supp.2d 947 [151 Educ. L. Rep. 854] (E.D. Mich. 2001).

Age

An appellate court in Pennsylvania rejected the claim of a high school coach with ten years of experience who alleged that he had a protected property interest in his job. The coach's contract was not renewed after the athletic director reported to the building principal and assistant principal that the plaintiff allegedly used a racial epithet during a game. The coach filed suit, alleging violations of his federal constitutional and liberty interests along with a state defamation claim. The court rejected the constitutional claims because the annual coaching contract did not create an entitlement to renewal and the plaintiff, who retained his teaching job, was not stigmatized.[79] Even so, the court agreed that since the coach presented a question of fact as to defamation, that issue could go to trial.

Constitutional Issues

First Amendment

Students and faculty sought to make contact, through unspecified means, with prospective student-athletes to make them aware of their school's use of a mascot which they deemed degrading to Native Americans. The group sought a temporary restraining order (TRO) to enjoin enforcement of a preclearance order from the chancellor, who cited the need to comply with NCAA recruiting regulations which prohibited any members of the university community from contacting prospective recruits without the expressed permission of the athletic director. A federal trial court in Illinois granted the group's request for a TRO since it thought that they demonstrated a substantial likelihood on the merits of their claim that the directive was a content-based prior restraint on speech.[80] The court ascertained that the group would have suffered irreparable harm if the TRO were not granted, since there was no other adequate remedy at law.

An attorney from Colorado who published and maintained a private Internet site which publicized a university's men's and women's athletic programs sued the university for violations of his right to free speech and false arrest in claiming that its athletic department's media relations director attempted to censor the site by denying him access to information which was available to other members of the media, prohibiting him from talking with department personnel, and by having him charged with, and detained for, trespass. On further review of the defendants' motion to dismiss, the Tenth Circuit affirmed that the plaintiff's allegations of false arrest were conclusory and insufficient to support his claim.[81] In rejecting the free speech retaliation claim, the court ruled that although the website was protected by the First Amendment and the media director's actions were motivated by this protected activity, the claim failed because the plaintiff had alternative channels through which he could seek information for his website.

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[78] Lamb-Bowman v. Del. State Univ., 152 F. Supp.2d 553 [155 Educ. L. Rep. 1174] (D. Del. 2001).

[79] Puchalski v. Sch. Dist. of Springfield, 161 F. Supp.2d 395 [156 Educ. L. Rep. 1092] (E.D. Pa. 2001).

[80] Crue v. Aiken, 137 F. Supp.2d 1076 [153 Educ. L. Rep. 251] (C.D. Ill. 2001).

Fourth Amendment

Students in Oklahoma challenged the constitutionality of a school board policy which required them to agree to submit to suspicionless drug testing before they could participate in extracurricular activities. On cross-motions for summary judgment, a federal trial court granted the board's motion on the ground that the policy was reasonable and did not violate students' Fourth Amendment rights.[82] On further review, the Tenth Circuit reversed in favor of the students in determining that, in balancing the government's interest in conducting a particular search against an individual's privacy, concern tilted in their favor.[83] The court was particularly persuaded by the fact that school officials were unable to provide evidence of an epidemic of illegal drug use among students in general or that there was an identifiable drug-abuse problem among a sufficient number of participants in nonathletic extracurricular activities.

In a case involving arguably the most far-reaching drug-testing policy to date, a sixth-grade student and his father successfully disputed a school board's mandatory drug-testing policy for all pupils in grades six to twelve.[84] A federal trial court found that the policy violated the Fourth Amendment because the board failed to demonstrate a sufficient special need for suspicionless testing of all students.

Where two students were forced to stand naked for sixteen minutes in a gym shower after ripping their swimsuits during swimming class, one of them, along with his parents, filed a ten-count complaint against the school board, administrators, and gym teacher. A federal trial court in Illinois dismissed the Fourteenth Amendment substantive due process claim since it was addressed under the Fourth Amendment charge.[85] In addition, the court dismissed a claim under the Family Educational Rights and Privacy Act (FERPA) since it was adopted to address systematic violations of privacy and not individual claims. The court did permit the students' claim for an unreasonable seizure under the Fourth Amendment to proceed.

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[81] Smith v. Plati, 258 F.3d 1167 [155 Educ. L. Rep. 1090] (10th Cir. 2001).

[82] Earls v. Bd. of Educ. Tecumseh Pub. Sch., 115 F. Supp.2d 1281 [148 Educ. L. Rep. 152] (W.D. Okla. 2000).

[83] Earls v. Bd. of Educ. Tecumseh Pub. Sch., 242 F.3d 1264 [151 Educ. L. Rep. 752] (10th Cir. 2001). *cert granted sub nom*, Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 509 [158 Educ. L. Rep. 544] (2001).

[84] Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp.2d 919 [152 Educ. L. Rep. 549] (N.D. Tex. 2001).

[85] Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F. Supp.2d 949 [156 Educ. L. Rep. 135] (N.D. Ill. 2001).

Fourteenth Amendment

Six high school students from Illinois were expelled for participating in a gang-related fight in bleachers during a football game. They sought further review of the rejection of a section 1983 claim over the constitutionality of a school rule on which their expulsions were based. The Seventh Circuit affirmed that a student who was permitted to withdraw from school prior to disciplinary hearings lacked standing but that the remaining plaintiffs had standing even though their expulsions ended and the rule had since been changed.[86] The court was of the view that the rule prohibiting students from engaging in "gang-like activity" was not impermissibly vague either on its face or as applied to the students.

Miscellaneous

Open Records Act

Where an ice hockey player filed a complaint over hazing, a trial court granted a local newspaper's request to compel university officials to release copies of the information with appropriate redactions to protect the privacy of the individuals involved. However, the court rejected the newspaper's request for attorney fees and expenses as the substantially prevailing party. On further review, the Supreme Court of Vermont affirmed that the newspaper was not entitled to attorney fees and expenses since it was not necessary to prevent the university from disclosing the response or to keep the newspaper from seeking disclosure.[87] The court disagreed with the newspaper's claim that university officials were motivated by covering up the incident to avoid embarrassment, relying instead on their position that they were motivated by not disclosing confidential information in violation of FERPA.

A newspaper petitioned for a writ of mandamus when university officials refused to release documents naming private individuals who entered into licensing agreements allowing them to use luxury suites in a multipurpose athletic and entertainment center. On further review of an order directing officials to release the information, an appellate court in California affirmed that the documents were subject to release under the state's public records act and that the public interest in disclosure outweighed its interest in nondisclosure.[88]

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[86] Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 251 F.3d 662 [154 Educ. L. Rep. 127] (7th Cir. 2001).

[87] Burlington Free Press v. Univ. of Vt., 779 A.2d 60 [156 Educ. L. Rep. 1153] (Vt. 2001).

Open Meetings Act

In Missouri, where a coach whose contract was not renewed filed a gender discrimination claim against her school board, the parties agreed to settle the complaint for $10,000. When a reporter contacted board officials about the agreement, its attorney confirmed its existence but did not disclose the terms. About one month later, the superintendent and the attorney for the board's insurance carrier confirmed the agreement's existence, but not its terms, to another reporter. In the coach's breach of the settlement suit against the board, a trial court granted her motion for summary judgment and awarded her $10,000 in liquidated damages. On further review, an appellate court reversed in explaining that the board did not violate the confidentiality portion of the agreement because the state open meetings act required members to make their vote on the agreement public upon final disposition of the controversy.[89]

A school board in Colorado sued the state high school activities association for failing to comply with the notice provision of the state open meetings act prior to the session at which it considered a challenge to an adverse realignment action. On further review of a dismissal in favor of the association, an appellate court agreed that since the board had actual notice of the meetings, it lacked standing because it had not suffered an injury in fact.[90] The panel was not persuaded by the provision of the open meetings act which empowers courts to issue injunctions to enforce its provisions when any citizen so applies, reasoning that the legislature cannot abrogate the standing requirement by statute.

Real Property

Where a school board in Arkansas filed suit in state court against a contractor and surety to recover the cost of remedial work for their allegedly unsatisfactory job of waterproofing athletic facilities, the defendants had the case moved to a federal venue which was then stayed pending arbitration. On further review of a judgment on an arbitration award of $2000,000 in favor of the board, the Eighth Circuit affirmed that the arbitrator had the authority to resolve the procedural arbitrability issues and did not engage in misconduct by denying a motion for continuance sought by one of the defendants based on a family member's outpatient surgery.[91]

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[88] California State Univ. v. Superior Ct., 108 Cal.Rptr.2d 870 [155 Educ. L. Rep. 664] (Cal. Ct. App. 2001).

[89] Calvert v. Mehlville R-IX Sch. Dist., 44 S.W.3d 455 [154 Educ. L. Rep. 378] (Mo. Ct. App. 2001).

[90] Pueblo Sch. Dist. No. 60 v. Colo. High Sch. Activities Ass'n, 30 P.3d 752 [156 Educ. L. Rep. 1413] (Colo. Ct. App. 2001).

In an effort to obtain adjacent private property to expand a university's athletic facilities, officials sought to purchase property from two landowners. After officials paid for the first parcel, they commenced eminent domain proceedings against the second owner, an African American male with title to about one-third more land than the initial owners, because they could not reach an agreement. When the owner had the suit removed to a federal trial court, it granted the university's motion to return the dispute to state court. The owner claimed that the condemnation proceedings violated a variety of his federal rights and that he could not get a fair trial in state court since the trial judge and members of the Supreme Court of Alabama were predisposed to give the university preferential treatment in exchange for support from a political action committee. On appeal, the Eleventh Circuit affirmed the removal to state court.[92] The court posited that as laws of general applicability not expressly providing for racial equality, the eminent domain proceeding did not provide the owner with redress. The court maintained that both sections 1981 and 1985 provided redress. Even so, the court discerned that the landowner failed to satisfy the second part of the test, namely that his rights would be denied or could not be enforced in state courts.

In New York, a school board proposed a capital improvement project which included a substantial sum to finance the construction of a heated swimming pool. Insofar as the township in which the school district was located had a two-tiered property tax system which distinguishes between homestead and non-homestead property, with levies against the latter being nineteen times those of the former, a non-homestead property owner challenged the project. A trial court dismissed the owner's claim as to the disproportionality of the tax levy on the basis that it fell under the jurisdiction of the state education commissioner. On further review, an appellate panel affirmed in rejecting the owner's charge that when the facts are not in dispute, a court may exercise original jurisdiction over a claim of unconstitutionality.[93] The court decided that it may properly exercise original jurisdiction only in a facial challenge to the constitutionality of a law, but not in an as-applied claim that was properly within the jurisdiction of the commissioner.

A school board challenged actions by a zoning hearing board and lower courts which denied its request to lease its baseball field to nonschool-related baseball teams. On further review, the Supreme Court of Pennsylvania affirmed that the board's statutory authority to rent its recreational fields for baseball games and practices had to be exercised consistently with local zoning regulations, particularly for activities which were not part of its core educational mission.[94] The court rejected the board's argument that the zoning board's recommendations were advisory since the statute on which it relied applied to county and municipal planning agencies and not to zoning commissions.

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[91] El Dorado Sch. Dist. # 15 v. Cont'l Cas. Co., 247 F.3d 843 [153 Educ. L. Rep. 62] (8th Cir. 2001).

[92] Alabama v. Conley, 245 F.3d 1292 [152 Educ. L. Rep. 516] (11th Cir. 2001).

[93] Finch, Pruyn & Co. v. Kearns, 722 N.Y.S.2d 838 [152 Educ. L. Rep. 753] (N.Y. App. Div. 2001).

Trademark

After operating under informal friendly agreements, a university and its educational foundation formalized their affiliation, stipulating that the latter could not use the former's name, that of its mascot, or its other trademarks or service marks without prior written consent. When the parties failed to renew their agreement, the university filed suit, alleging trademark infringement and unfair competition and seeking a preliminary injunction against the foundation. A federal trial court in Pennsylvania granted the injunction, remarking that the trade and service marks were valid and legally protectable, owned by the university, and that their continued use by the foundation would have caused confusion over who was the source of the goods and services it offered.[95]

In a dispute involving the phrase "March Madness" the Illinois High School Association (IHSA), apparently the first organization to coin it, and the NCAA formed a limited liability corporation to license the moniker as a registered trademark. The corporation licensed the name to the NCAA and ISHA for their basketball tournaments, but retained the right to license it for other activities. When a company purchased the Internet domain name marchmadness.com from the person who originally registered it, the March Madness corporation filed a trademark infringement suit in Texas where a federal trial court denied both parties' motions for summary judgment.[96] The court noted that genuine issues of material fact remained as to whether the name was protectable since the defendant not only failed to show that the moniker was generic as a matter of law and not subject to trademark protection but also that it intended a specific use for the website, covering the basketball tournament. The court further asserted that the defendant raised a genuine issue of material fact as to whether the March Madness moniker was protected as a name unrelated to the product or service it promotes but comes to be associated with such a product or service.

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[94] Hazelton Area Sch. Dist. v. Zoning Hearing Bd., 778 A.2d 1205 [156 Educ. L. Rep. 1136] (Pa. 2001).

[95] Villanova Univ. v. Villanova Alumni Educ. Found., 123 F. Supp.2d 293 [149 Educ. L. Rep. 513] (E.D. Pa. 2000).

[96] March Madness Athletic Ass'n, LLC v. Netfire, 162 F. Supp.2d 560 [157 Educ. L. Rep. 175] (N.D. Tex. 2001).

Antitrust

A soccer player in California failed in her bid to challenge an intercollegiate athletic association's rule that discouraged her from making an intraconference transfer. After the student-athlete became dissatisfied with the quality of her university's soccer and academic programs, she charged that school officials arranged for athletes to receive fraudulent academic credit through sham classes, and sought to transfer to a neighboring institution. When university officials opposed the transfer and invoked an athletic conference rule, the student lost one year of athletic eligibility as well as athletically related financial aid. Alleging that university officials targeted her in retaliation for her charges about the possible academic fraud, she unsuccessfully sued for breach of contract and a violation of the Sherman Antitrust Act. The Ninth Circuit affirmed that the conference rule did not have a significant anticompetitive effect because it was an alleged isolated act of retaliation, not an injury to a definable market.[97]

Breach of Contract

Where an individual purchased two luxury seats at a university's stadium that came with a yearly ticket and service charge fee, and attended football games under this arrangement for sixteen years, the prices were increased after the institution renovated the luxury boxes. When the ticket holder refused to pay the increased fees, the university refunded his original down payment and reallocated his seats. The ticket holder brought a breach of contract suit against the university, alleging that his seats were goods in which he had a property interest and that it breached his contractual interest by unilaterally boosting prices. The university countered that the ticket holder breached his contractual obligation by refusing to pay the increased fees. The Ohio Court of Claims found that the seats were not goods, but rather personal seat licenses owned by the state, and that the ticket holder was a licensee.[98] The court concluded that since the ticket holder, not the university, breached the contract, the university acted reasonably within its right in refunding the money and reallocating the seats.

In a slightly similar case, a long-time season ticket holder in Kansas sued a university and its athletic association for requiring ticket holders to contribute to a scholarship fund when they annually renewed their basketball tickets. The ticket holder challenged a trial court's denial of his motion for declaratory judgment to prevent the university from collecting the money. An appellate court affirmed that the ticket reorder form was a license, granting a right of use of the owner's property, rather than a lease, granting a right of possession.[99] In declaring that the form was a license agreement with a fixed term, the court agreed that university was within its rights to affix different conditions for the purchase of the tickets in subsequent renewals.

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[97] Tanaka v. Univ. of S. Cal., 252 F.3d 1059 [154 Educ. L. Rep. 788] (9th Cir. 2001).

[98] Rayle v. Bowling Green State Univ., 739 N.E.2d 1260 [149 Educ. L. Rep. 884] (Ohio. Ct. Cl. 2000).

Conclusion

This year's highest profile case, *Brentwood Academy v. Tennessee Secondary School Athletic Association*, established the precedent that the enforcement actions of state activities associations can constitute state action under the Fourteenth Amendment as enforced through section 1983. Moreover, an increasing number of claims are being brought under title IX to enforce gender equity claims against either K-12 school districts or state athletic associations. Finally, negligence claims against educational institutions for injuries suffered by participants, spectators, and others continue to crop up, with the results generally dependent on the unique features of state tort, immunity, and common law.

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[99] Wichita State Univ. Athletic Ass'n v. Marrs, 28 P.3d 401 [155 Educ. L. Rep. 1452] (Kan. Ct. App. 2001).

7

HIGHER EDUCATION

Brad Colwell

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Introduction

In 2001, federal and state courts issued opinions in almost 100 cases focusing on legal issues in higher education. This chapter reviews cases relating to the legal aspects of a university and spends considerable time on employment-related issues, especially as they pertain to discrimination based upon sex, race, national origin, disability, or religion. The remainder of the chapter examines state issues such as civil liability in tort and contract as well as federal matters involving statutory and constitutional protections. Cases involving students in higher education are addressed in Chapter 8.

Intergovernmental Relationships

Accreditation

A college in Georgia sued an accreditation foundation in a federal trial court in Michigan seeking both declaratory relief for antitrust violations and redress for various state tort law claims over the denial of accreditation for its interior design program. On further review of a grant of summary judgment in favor of the foundation, the Sixth Circuit affirmed that the foundation did not have the market power to cause an antitrust injury.[1] The court held that loss of accreditation does not constitute an antitrust injury since it is a loss in reputation or student enrollment. The court dismissed the state law claims since its primary task was to focus on the procedures involving the accreditation team, not its substance.

Legislative Authority

Parents in New York sued a public university for agreeing to sponsor a charter school, alleging that its trustees acted arbitrarily and abused their discretion by failing to make a statutorily required finding that granting the charter would have been likely to improve student learning. An appellate court affirmed the plaintiffs' allegations and remanded the case, noting that the statutory finding was not implicit in the trustees' approval of the charter.[2]

Sunshine Laws

A local newspaper sought an injunction against a local community college over the failure of a search committee to interview candidates for the college presidency in open sessions. The Supreme Court of Nevada concluded that the interviews did not have to be in open sessions insofar as the job of college president was not a "public officer" both because it was not created by law and since the president did not regularly exercise sovereign governmental functions set by law, but rather, implemented policies of the board of regents.[3]

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[1] Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521 [152 Educ. L. Rep. 38] (6th Cir. 2001).

[2] Board of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trs. of the State Univ. of N.Y., 731 N.Y.S.2d 524 [157 Educ. L. Rep. 825] (N.Y. App. Div. 2001).

Freedom of Information

In all three of the cases involving a Freedom of Information Act (FOIA), university officials had to disclose the requested records. The first case concerned who was responsible for the costs of litigating a successful FOIA suit. The Supreme Court of Vermont examined an appeal by a local newspaper over the denial of its request for expenses and attorney fees it incurred in seeking the release of documents related to hazing incidents that took place at a public university. Originally, the newspaper filed suit under the Public Records Act to disclose the names of the students involved in the incident as well as the university's response. After the university complied with an order to produce documents, the newspaper sought to recover expenses and attorney fees since it substantially prevailed in the suit. The court ruled that even though the litigation was necessary to obtain the information, the newspaper was not entitled to reimbursement because it could not show that the trial court judge abused his discretion.[4] The court agreed with university officials who sought to avoid possible violations of the Family Education Rights and Privacy Act rather than not release the documents in order to cover-up the scandal or avoid public scrutiny.

A bookstore owner in New York made a FOIA request of a public university to obtain book lists that faculty members used so that it could purchase them in order to compete with the on-campus bookstore. When university officials denied the owner's request, an appellate court affirmed that such information constituted a record subject to disclosure even though it was not centrally preserved by university officials.[5] The court maintained that since the book lists were prepared by faculty members and not the on-campus bookstore, they were disclosable.

In California, a newspaper filed suit under the state's Public Records Act to compel the disclosure of information of private donors who contributed to the construction of a multipurpose arena at a public university and operated by a university-affiliated, nonprofit corporation. In exchange for generous donations, the private donors would receive luxury suites in the arena after they signed licensing agreements for their use. A trial court ordered the university and the corporation to disclose the names of the donors and the license agreements. On further review, an appellate court affirmed that the documents were public records and that the donors' names and license agreements had to be released.[6] The court reasoned that public interest in disclosure outweighed nondisclosure and equated the donations to a commercial transaction. The court added that the intrusion in the donors' privacy would be minimal and it was speculative whether the release of the information would "chill" future contributions.

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[3] University and Cmty. Coll. Sys. of Nev. v. Dr. Partners, 18 P.3d 1042 [151 Educ. L. Rep. 596] (Nev. 2001).

[4] Burlington Free Press v. Univ. of Vt., 779 A.2d 60 [156 Educ. L. Rep. 1153] (Vt. 2001).

[5] Mohawk Book Co. Ltd. v. State Univ. of N.Y., 732 N.Y.S.2d 272 [158 Educ. L. Rep. 780] (N.Y. App. Div. 2001).

Competitive Bidding

Where a public university wanted to build a conference center on campus, it entered into an arrangement to lease the property from a company, which in turn would build the center and lease it back to the university with the rental payments representing the cost of the construction. Before the project was fully bid, local construction companies filed suit claiming that the university violated the state's competitive bidding statutes. An appellate court in Ohio affirmed that the university was obligated to follow the competitive bidding statutes.[7] In rejecting the university's argument that the financing arrangement took the project outside the bidding statutes, the court asserted that the university was the owner or, at a minimum, the project was a public improvement. The court remanded the dispute for a consideration of monetary damages.

Funding

After the higher education commission in Maryland denied funding to a religious college because it was "pervasively sectarian," even though it met the criteria for funding private schools, the federal trial court ordered it to make the funds available. On further review, the Fourth Circuit affirmed in favor of the college.[8] In reviewing *Mitchell v. Helms*,[9] a plurality wherein the Supreme Court established its most recent guidelines under which sectarian schools may be eligible for government aid, the panel agreed that the funding criteria were neutral toward religion and that none of the money would be diverted to aid religious purposes.

Zoning

A university located in the District of Columbia (D.C.) challenged a zoning ordinance enacted to cap its enrollment until it could house 70 percent of its students on campus. A federal trial court granted the university's request for a preliminary injunction against enforcement of the ordinance.[10] The court noted that the perceived negative impact of the overflow of off-campus students into the community was speculative and the prospect of withdrawing offers of admission to meet the enrollment cap constituted an irreparable injury.

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[6] California State Univ., Fresno Ass'n v. The Superior Court of Fresno County, 108 Cal.Rptr.2d 870 [155 Educ. L. Rep. 664] (Cal. Ct. App. 2001).

[7] Mechanical Contractors Ass'n of Cincinnati v. Univ. of Cincinnati, 750 N.E.2d 1217 [155 Educ. L. Rep. 782] (Ohio Ct. App. 2001).

[8] Columbia Union Coll. v. Oliver, 254 F.3d 496 [155 Educ. L. Rep. 24](4th Cir. 2001).

[9] 120 S.Ct. 2530 [145 Educ. L. Rep. 44](2000).

Jurisdiction

The federal trial court in D.C. considered the consolidation of multiple suits over an alleged patent infringement.[11] In 1996, a private university in Georgia sued two pharmaceutical companies in a federal trial court, alleging that they infringed on one of its patents. The United States Patent and Trademark Office Board of Patent Appeals and Interferences initiated proceedings regarding the patent, thus staying the claim. After the Board acted, the university filed federal suits in Georgia and D.C., while the companies filed one in D.C. The university moved to dismiss the companies' suits and transfer the cases to Georgia, while the companies wanted them consolidated. The D.C. court explained that all of these cases were inextricably related and should be transferred to the federal court in Georgia based on the general principle that the court that first acquired jurisdiction has priority. In addition, the court relied on the fact that none of the parties or witnesses were located in D.C. and a substantial amount of discovery had already occurred in the Georgia court.

In two other cases, courts dismissed pending claims for lack of jurisdiction due to a plaintiff's failure to adhere to statutory guidelines regarding the appropriate party or the proper court. In North Carolina, a temporary director of a college program at a public university sought relief after his contract expired and he was replaced by a member of the opposite race and sex. An administrative law judge (ALJ) granted the university's motion for summary judgment due to a lack of jurisdiction. On further review, an appellate court agreed that the director could not seek administrative relief because the state's employment discrimination statutes specifically exempt certain employees, including the director's position, from protection.[12] The court rejected the director's argument that at the time of the suit he was no longer an exempt employee since it focused on his employment status at the time the case arose.

When a former head engineer of a public university filed suit in a chancery court seeking reinstatement, it transferred the case to a trial court which, in turn, granted the university's motion to dismiss for lack of jurisdiction. On further review, the Supreme Court of Mississippi affirmed that since state law directs that a termination decision be brought to a trial, not chancery, court his claims were barred by res judicata.[13]

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[10] George Washington Univ. v. Dist. of Columbia, 148 F.Supp.2d 15 [155 Educ. L. Rep. 329] (D.D.C. 2001).

[11] Biochem Pharma, Inc. v. Emory Univ., 148 F. Supp.2d 11 [155 Educ. L. Rep. 325] (D.D.C. 2001).

[12] Hillis v. Winston-Salem State Univ., 549 S.E.2d 556 [155 Educ. L. Rep. 1470](N.C. Ct. App. 2001).

Immunity

As is often the case, higher education institutions claim immunity from liability. Whether an institution is public or private determines the type of immunity that may be available. Not uncharacteristically, plaintiffs respond by challenging the application of immunity to avoid motions for summary judgment or to dismiss.

Eleventh Amendment

The Eleventh Amendment prohibits an individual from suing a state for monetary damages in federal court. As a rule, state employees are afforded Eleventh Amendment immunity if sued in their official capacities and damages would be paid from the state treasury. Conversely, suits seeking damages from state officials in their individual capacities are generally not barred by the Eleventh Amendment. However, this type of immunity does not apply to every case in which a state is a defendant, such as where a party seeks an equitable remedy. Moreover, Eleventh Amendment immunity is not absolute since Congress can abrogate it or a state can waive it.

In Oklahoma, an employee who was dismissed sought monetary and equitable relief under the Family and Medical Leave Act (FMLA) from both her university and her supervisor. The supervisor argued that since the university was the real party in interest, the suit should have been barred by the Eleventh Amendment because even if the supervisor were liable in his individual capacity, the institution would have had to comply with the FMLA to protect its employees from personal liability. The Tenth Circuit ruled that even though state monies may ultimately be used to satisfy a judgment obtained against a public official who is sued in his or her individual capacity, a state cannot extend its sovereign immunity to its employees by voluntarily assuming an obligation to indemnify them.[14]

A faculty member at a public university in Georgia filed suit in both federal and state trial courts alleging that officials violated his constitutional property and liberty interests. The state's attorney general sought to have the case removed to federal court and immediately filed an unsuccessful motion to dismiss based on Eleventh Amendment immunity; the court thought that the attorney general waived the state's Eleventh Amendment immunity. On appeal, the Eleventh Circuit reversed in rejecting the argument that a removal to federal court constituted a waiver of Eleventh Amendment immunity.[15] The court reviewed state statutory and case law in indicating that the attorney general did not possess the authority to waive Eleventh Amendment immunity.

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[13] Smith v. Univ. of Miss., 797 So.2d 956 [158 Educ. L. Rep. 890](Miss. 2001).

[14] Cornforth v. Univ. of Okla. Bd. of Regents, 263 F.3d 1129 [156 Educ. L. Rep. 814] (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1172 (2002).

In Puerto Rico, an employee of a public university filed a suit for age, disability, and title VII employment discrimination. At issue was whether Puerto Rico is considered a state for the purposes of Eleventh Amendment immunity. The court posited that since Puerto Rico is considered a state, it is afforded the protections of Eleventh Amendment immunity.[16]

Sovereign Immunity

Under the doctrine of sovereign immunity, a government agency is not liable for the torts of its officers or agents unless there is a constitutional or statutory provision waiving immunity. Most states have tort immunity statutes that detail the circumstances under which a state or local actor may be liable for civil damages.

An applicant for a job vacancy at a public university filed an age discrimination suit when officials hired someone who was under the age of forty. On further review of the rejection of its sovereign immunity defense, the Supreme Court of Arkansas reversed in favor of the university.[17] The court reasoned that the state's age discrimination statute contains neither an intent to waive sovereign immunity nor an express provision to subject it to claims for monetary relief for alleged violations of the statute.

In Michigan, an appellate court interpreted the scope of an exception to the state governmental immunity statutes in a claim filed by an employee of a community college who was injured while walking on the elevated loading dock of a maintenance building. The college successfully argued that the plaintiff's claim was outside the "public building exception" to governmental immunity. An appellate court reversed in acknowledging that the loading dock was part of the building even though it was located outside of its four walls.[18] The court emphasized that the loading dock was part of the structure's original blueprints and that ingress and egress from the back of the building was not possible without the loading dock.

A former employee of an extension service at a public university in North Carolina sued it and the State for breach of contract. The employee was given a three-year appointment, at the end of which he would be evaluated and a judgment made about his future employment. When the employee was released the next year for unsatisfactory performance, he filed suit. On further review of the denial of the university's motion for summary judgment based on sovereign immunity, an appellate court affirmed that whenever the State enters into a contractual relationship, it waives its sovereign immunity and implicitly consents to be sued for contract damages in the event of a breach.[19]

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[15] Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 251 F.3d 1372 [154 Educ. L. Rep. 470] (11th Cir. 2001), *cert. granted*, 122 S. Ct. 456 [158 Educ. L. Rep. 543] (2002).

[16] Vizcarrondo v. Bd. of Trs. of the Univ. of P.R., 139 F.Supp.2d 198 [153 Educ. L. Rep. 885] (D. Puerto Rico 2001).

[17] Arkansas. v. Goss, 42 S.W.3d 440 [153 Educ. L. Rep. 802] (Ark. 2001).

[18] O'Connell v. Kellogg Cmty. Coll., 625 N.W.2d 126 [152 Educ. L. Rep. 777] (Mich. Ct. App. 2001).

Where a patient at a hospital operated by a public university in Texas sued it for fraudulently concealing that she had HIV, a trial court rejected its claim of sovereign immunity. In reversing in favor of the hospital, an appellate court reviewed the state Tort Claims Act which waives immunity in limited circumstances, including personal injuries caused by a condition or use of tangible personal or real property by the state.[20] The court was of the opinion that the plaintiff did not allege that her injuries were caused by use of tangible personal property because her medical information was only an abstract concept that was intangible, regardless of the fact that the information was in written form on her patient chart.

Charitable Immunity

Some state legislatures have conferred immunity on private institutions since they are not afforded the protections of sovereign immunity. In the only case that explored the scope of such a law this year, an appellate court in New Jersey considered whether a private university was entitled to charitable immunity against a negligence claim where a patron was injured in one of its auditoriums while attending a symphony performance. The court pointed out that state law provides that a nonprofit corporation or society exclusively for charitable or educational purposes shall not be liable in negligence when an injured party is one of its beneficiaries. In so doing, the court affirmed a grant of charitable immunity because the symphony was educational as well as charitable and the injured party was a beneficiary of the performance even though she had to pay an admission fee.[21]

Federal Issues

Title IX

Many cases reference title IX causes of action, but most are part of larger title VII sex discrimination suits. Two federal trial courts grappled with whether title IX was the exclusive remedy for employment discrimination when the employee was afforded protections of title VII.

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[19] Moore v. N.C. Coop. Extension Serv., 552 S.E.2d 662 [157 Educ. L. Rep. 945] (N.C. Ct. App. 2001).

[20] University of Tex. Med. Branch at Galveston v. Mullins, 57 S.W.3d 653 [158 Educ. L. Rep. 873] (Tex. App. 2001).

[21] Lax v. Princeton Univ., 779 A.2d 449 [156 Educ. L. Rep. 1166] (N.J. Super. Ct. App. Div. 2001).

A female at a private university who was dismissed for improperly reporting her hours claimed that this was a pretext for sexual harassment. In the woman's title IX and title VII suit, a federal trial court in New York decreed that there is no private right of action under title IX for claims of employment discrimination at federally funded education institutions. According to the court, recognizing such a claim would have provided the woman with an extra employment discrimination remedy under title IX that was not available to title VII claimants whose employer is not an educational institution receiving federal aid.[22] The court remarked that it had jurisdiction to hear a retaliation claim, even though it was not included in the administrative charges filed with the state's division of human resources.

In a similar case, a female coach, who was twice denied a job as athletic director in favor of male candidates, filed suit under title VII, title IX, the Equal Pay Act, and state law. In response to the defendants' motion for summary judgment, a federal trial court in Alabama observed that the coach's title IX claim was barred because it does not provide a private right of action when an employer is also subject to title VII. The court believed that the title VII claim was barred by the statute of limitations since the allegations did not constitute a continuing violation. The court was of the view that while Eleventh Amendment immunity protected the college and its president from the section 1983 and state law claims, they did not have immunity from the Equal Pay Act charge.[23]

Internal Revenue Act

An employee at a community college unsuccessfully sued it for complying with a Internal Revenue Service (IRS) tax lien and withholding a portion of his salary. The Supreme Court of Mississippi affirmed the rejection of the employee's state constitutional and statutory law claims on the ground that the college and its attorney were immune from liability.[24] The court wrote both that federal law mandates that any person or entity in possession of property that is the subject of an IRS lien must surrender it to the IRS and that any person who complies with a lien shall be discharged from liability to a delinquent taxpayer.

False Claims Act

A former employee of a private university sued it for breach of contract and his supervisor for violations of the False Claims Act (FCA). A jury in the federal trial court in D.C. entered a verdict against the supervisor for retaliation under the FCA. On appeal, the supervisor claimed that he was not the employer within the meaning of the FCA. The D.C. Circuit reversed in deciding that the FCA only mentions the employer as incurring liability, which typically did not apply to a supervisor in his individual capacity.[25] Moreover, the court discerned that the FCA provided reinstatement as a remedy for a violation of its terms, relief which the supervisor could not grant in his individual capacity.

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[22] Gardner v. St. Bonaventure Univ., 171 F. Supp.2d 118 [159 Educ. L. Rep. 25] (W.D. N.Y. 2001).

[23] Morris v. Wallace Cmty. Coll. Selma, 125 F. Supp.2d 1315 [150 Educ. L. Rep. 392] (S.D. Ala. 2001).

[24] Moffett v. Jones County Junior Coll., 791 So. 2d 292 [156 Educ. L. Rep. 735] (Miss. 2001).

Patents

In a long-standing case involving a vitamin manufacturer, a university, and two of its faculty members, the federal trial court in Colorado considered the appropriate relief to be afforded to the faculty members as a result of their being defrauded by the manufacturer. The court ruled that the faculty members were entitled to monetary damages in the amount that the manufacturer would have paid to license their invention.[26] Insofar as the court was satisfied that the faculty members were entitled to additional relief due to the unjust enrichment of the manufacturer, it ordered the company to return the net profits to them.

Constitutional Law Decisions

First Amendment Speech

The first of three circuit court cases on issues relating to alleged deprivations of First Amendment speech rights arose in Pennsylvania in a dispute over the speech rights of a faculty member. A tenured faculty member who was suspended for failing to adhere to the university president's request to change a student's grade was later dismissed for writing a letter to the board of trustees that was critical of the president. The faculty member unsuccessfully filed suit alleging that he was dismissed in retaliation for exercising his rights to academic freedom and free speech. The Third Circuit reasoned that university officials did not violate the faculty member's rights since in the classroom the university was the speaker and he was its agent for First Amendment purposes.[27] The court added that since the faculty member did not address an issue of public concern, the president was entitled to qualified immunity.

The operator of a private website in Colorado that covered sports events at a public university filed suit after a member of the media relations staff allegedly tried to censor and interfere with his website. The plaintiff claimed that he was retaliated against for exercising his First Amendment rights. On further review of a dismissal in favor of the defendants, the Tenth Circuit affirmed that the plaintiff did not meet the legal test for retaliation since the staff member's actions did not cause him to suffer an injury that would dissuade a person of ordinary firmness from continuing to engage in First Amendment activity.[28] Further, the court rejected the plaintiff's argument that he had a First Amendment right to gather news that was violated when the staff member chose not to provide him with information about the athletic programs.

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[25] Yesudian *ex rel.* U.S. v. Howard Univ., 270 F.3d 969 [158 Educ. L. Rep. 546] (D.C. Cir. 2001).

[26] University of Colo. Found. v. Am. Cyanamid, 153 F. Supp.2d 1231 [156 Educ. L. Rep. 207] (D. Colo. 2001).

[27] Brown v. Armenti, 247 F.3d 69 [153 Educ. L. Rep. 48] (3d Cir. 2001).

Unlike the two previous disputes, the focal point of this First Amendment case was the issue of viewpoint discrimination. The Ninth Circuit reviewed a suit filed by a former faculty member in Montana who alleged that his department chair violated his First Amendment rights by tearing down handbills advertising a campus speech that he was to give.[29] The court affirmed that the handbill was entitled to First Amendment protection and that the chair engaged in viewpoint discrimination because he only suppressed the speech of one speaker. The court rejected the chair's argument for qualified immunity since the law regarding suppression of speech has been clearly articulated for more than thirty years.

Discrimination in Employment

Again this year, numerous cases were litigated by employees in higher education who alleged discrimination in the workplace. Federal law affords statutory protection for discrimination based on disability, national origin, race, sex, and religion, as well as for equitable compensation between the sexes.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) provides that states and other employers are prohibited from discriminating against a qualified individual with a disability with regard to terms, conditions, and privileges of employment. In 2001, four federal cases were litigated, including a seminal Supreme Court case on state governmental immunity, *Board of Trustees of the University of Alabama v. Garrett*,[30] on the ADA. In *Garrett*, the Court addressed the primary question of whether Congress intended to abrogate Eleventh Amendment immunity when it enacted the ADA. The Court held that ADA suits brought in federal court by state employees for monetary damages are barred by the Eleventh Amendment. In its rationale, the Court contended that Congress unequivocally intended to abrogate the immunity, but did not do so with a valid grant of constitutional authority in accordance with the Fourteenth Amendment. The Court first wrote that Congress did not enact the ADA in proportional response to correct violations occurring at the state level since there was no pattern of unconstitutional employment discrimination against the disabled and the majority of these cases occurred in the private sector. Second, the Court found that even if the states engaged in a pattern of unconstitutional discrimination, the ADA's duty to accommodate far exceeded what was constitutionally required. Consequently, the Court concluded that applying the ADA to the states would have allowed Congress to expand its legislative authority.

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[28] Smith v. Plati, 258 F.3d 1167 [155 Educ. L. Rep. 1090] (10th Cir. 2001).

[29] Giebel v. Sylvester, 244 F.3d 1182 [152 Educ. L. Rep. 496] (9th Cir. 2001).

[30] 531 U.S. 356 [151 Educ. L. Rep. 35] (2001).

Following *Garrett*, the Sixth Circuit reviewed a suit filed by a surgical resident at a public university in Ohio who was dismissed after officials denied his request for a reasonable accommodation due to his depression. The court affirmed that the resident was not disabled since a major life activity was not substantially limited by his mental condition insofar as he was taking medication to control his depression and the symptoms were short-term.[31]

In a case from Arkansas, the Eighth Circuit affirmed a grant of summary judgment in favor of a private college that was accused of violating the ADA.[32] Where an employee was injured while attending a conference and could no longer perform her administrative responsibilities during the time she was still on disability leave, the university president reorganized the administrative staff and combined her old job with new responsibilities. After the employee rejected the university's offer of a different position and unsuccessfully applied for the newly reconfigured job, she filed suit for numerous theories of employment discrimination, including ADA violations. The court affirmed that the employee could not show that she was qualified to perform the essential functions of the new job and that her requested accommodation to work part-time would not have allowed her to perform the essential functions of the job.

An employee at a private university in New York, who was dismissed due to poor attendance, filed a complaint with the EEOC, alleging unlawful termination, retaliation, and failure to accommodate her disability. In permitting the woman's suit to proceed, a federal trial court asserted that the 300-day limitation period to file a complaint was equitably tolled since the employee was a pro se claimant who suffered from mental and physical conditions after her discharge.[33] The court specified that the employee's title VII claims should not have been dismissed solely because she did not correctly complete the EEOC form as long as the allegation was sufficient to plead a title VII case. The court was convinced that the claims not mentioned in the initial EEOC charge were not barred if they were reasonably related to the initial charge.

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[31] Swanson v. Univ. of Cincinnati, 268 F.3d 307 [158 Educ. L. Rep. 60] (6th Cir. 2001).

[32] Hatchett v. Philander Smith Coll., 251 F.3d 670 [154 Educ. L. Rep. 134] (8th Cir. 2001).

[33] Tsai v. Rockefeller Univ., 137 F. Supp.2d 276 [153 Educ. L. Rep. 159] (S.D.N.Y. 2001).

Equal Pay Act

The Equal Pay Act (EPA) affords a remedy to a plaintiff who can show that an employer pays different wages to employees of the opposite sex who perform equal work on jobs requiring equal skill, effort, and responsibility under similar working conditions. In two reported cases the main issue was the appropriateness of plaintiffs using statistics to help make a prima facie case for violations of the EPA. A female faculty member in Texas brought title VII and EPA claims against her university after the husband of another female faculty member was hired at a significantly higher salary. On further review of a jury award in favor of the plaintiff, the Fifth Circuit affirmed that the use of statistics showing gender disparity in faculty salaries was sufficient to support a prima facie case for both title VII and the EPA.[34] The court noted both that the institution's affirmative defenses were pretextual and that the Eleventh Amendment did not prohibit the application of the EPA to the university.

Similarly, a federal trial court in New York awarded a female faculty member back pay for a violation of the EPA. On appeal to the Second Circuit, the university argued that the faculty member failed to identify any higher paid comparable males who performed equal work in similar conditions after she compared herself to a male colleague in a different department. In affirming, the court rejected the university's argument and explained that it was a jury's task to consider whether two positions are substantially equivalent.[35] The court reflected that once a specific male counterpart has been identified, statistical averages derived by a regression analysis may be utilized, especially if there is only one higher paid male and the discrepancy in salaries is particularly high.

The Seventh Circuit considered the claim of a female faculty member at a public university in Wisconsin who alleged violations of both the EPA and title IX in light of her being allegedly underpaid compared to males with similar credentials. At issue was whether the EPA and title IX abrogated Eleventh Amendment immunity. Applying the rationale from *Garrett* to the EPA, the court affirmed that it did abrogate Eleventh Amendment immunity because the Act targeted unconstitutional gender discrimination.[36] The court commented that Congress intended to require states to waive immunity from title IX suits in exchange for their receipt of the statute's accompanying federal funds.

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[34] Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio, 261 F.3d 542 [156 Educ. L. Rep. 467] (5th Cir. 2001), *reh'g denied* (2002).

[35] Lavin-McEleney v. Marist Coll., 239 F.3d 476 [150 Educ. L. Rep. 646](2d Cir. 2001).

[36] Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541 [157 Educ. L. Rep. 27] (7th Cir. 2001).

Title VII

Federal law makes it an unlawful practice for an employer to discriminate against an employee with respect to compensation, terms, conditions, or privilege of employment due to race, color, sex, or national origin. Plaintiffs lacking direct evidence of intentional discrimination have to establish their case indirectly by utilizing the burden-shifting test established by the Supreme Court in *McDonnell Douglas Corp. v. Green.*[37]

National Origin

In the first of two federal trial court cases regarding employment discrimination based on national origin, a Hispanic applicant, who was rejected for a part-time faculty position teaching Spanish at a university in Washington, D.C., filed a title VII suit alleging national origin discrimination. The university filed a motion for summary judgment, responding that the plaintiff failed to establish a prima facie case of discrimination or show that its reasons for not selecting him were pretextual. The court granted the university's motion since the plaintiff could not establish that officials continued to seek applicants after his application was rejected.[38]

Three years after an Ethiopian was hired in a tenure-track position by a university in Pennsylvania, she was placed on unpaid leave and ultimately her annual contract was not renewed because she would not teach when officials refused to change the days on which her classes were scheduled. In response to the faculty member's title VII suit for national origin discrimination and retaliation, a federal trial court granted the university's motion for summary judgment.[39] Regarding the retaliation count, the court posited that the faculty member engaged in protected activity by filing an EEOC complaint and suffered adverse employment action when her contract was not renewed. Even so, the court indicated that there was no causal connection between the two. As for the national origin claim, the court declared that the faculty member could not establish a prima facie case of discrimination under *McDonnell Douglas* since she could not show the adverse employment action gave rise to an inference of discrimination.

Race

In both actions involving alleged racial discrimination, federal trial courts granted motions for summary judgment filed by universities since the African American employees failed to establish prima facie cases. An African American surgeon at a university-operated hospital who claimed that she was constructively discharged filed suit for racial discrimination under title

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[37] 411 U.S. 792 (1973).

[38] Ben-Kotel v. Howard Univ., 156 F. Supp.2d 8 [156 Educ. L. Rep. 583] (D.D.C. 2001).

[39] Fekade v. Lincoln Univ., 167 F. Supp.2d 731 [158 Educ. L. Rep. 288] (E.D.Pa. 2001).

VII. A federal trial court in Texas granted the hospital's motion for summary judgment on the ground that the even though her charge was timely filed with the EEOC, the surgeon did not establish a constructive discharge claim since she could not prove that working conditions were so intolerable that a reasonable employee would have felt compelled to resign.[40] As to the racial discrimination claim, the court determined that the surgeon did not meet the burden-shifting test in *McDonnell Douglas* and the hospital's reasons were not pretextual.

When an African American accountant for a private university in Texas sued under title VII for race discrimination after allegedly being denied training, promotions, and equal pay, a federal trial court granted the university's motion for summary judgment.[41] The court specified that the employee could not show that the pay differential was based on discriminatory intent since the colleagues with whom he compared his salary were not similarly situated based upon experience. In addition, the court ascertained that the retaliation claim failed because there was no evidence that university officials were aware of the employee's complaint when they dismissed him. As to all other claims, the court did not believe that the employee could show that the university's actions were pretextual.

Sex Discrimination

A female faculty member, who brought a title VII sex discrimination and retaliation claim against a private university in Washington, D.C., initially filed a complaint with the office of human rights after her salary was reduced for failing to teach an extra course that was added to her schedule. An appellate court in D.C. reversed the directed verdict against the plaintiff on the basis that evidence establishing retaliation should have been allowed.[42] At issue was whether the faculty member engaged in a protected activity when she wrote a memorandum to the dean complaining of a sexist mentality toward her. The court pointed out that protected activity did not have to be a formal complaint, but rather, could be an informal notification to the employer of discriminatory conduct.

Sexual Harassment

A new line of case law regarding sexual harassment has developed since *Burlington Industries v. Ellerth*[43] wherein the Supreme Court ruled that the two traditional sexual harassment classifications, hostile environment and quid pro quo, were of limited value. Instead, the Court reclassified harassment cases into two groups: harassment that culminates in a tangible employment action, or harassment with no tangible action but which was sufficient to constructively alter an employee's working conditions.

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[40] Jackson v. Univ. of Tex. M.D. Cancer Ctr., 172 F. Supp.2d 860 [159 Educ. L. Rep. 145] (S.D. Tex. 2001).

[41] Ceasar v. Lamar Univ., 147 F. Supp.2d 547 [155 Educ. L. Rep. 276] (E.D.Tex. 2001).

[42] Carter-Obayuwana v. Howard Univ., 764 A.2d 779 [150 Educ. L. Rep. 447] (D.C. 2001)

[43] 524 U.S. 775 [141 Educ. L. Rep. 663] (1998).

The first of four cases concerned the threshold issue of evaluating whether an employee experienced a tangible employment action. A female employee of a university in Hawaii filed suit for sexual harassment under title VII and various state law torts after ending a consensual sexual relationship with a male colleague. A federal trial court granted the university's motion for summary judgment in observing that the female could not prove that her reassignment to another department or that use of her sick leave constituted a tangible employment action and that officials exercised reasonable care to prevent or promptly correct any sexually harassing behavior.[44] The court maintained that the university was entitled to Eleventh Amendment immunity, as was the male colleague for all of the claims that were filed against him in his official capacity.

In the last three cases, federal courts litigated issues regarding retaliation for protected activity under title VII. A faculty member at a university in Texas filed sexual harassment and retaliation claims under title VII when officials allegedly failed to stop same-sex harassment. After the faculty member filed his complaint, he was denied a stipend for his work as a clinical coordinator. On further review of a judgment in favor of the faculty member, the Fifth Circuit affirmed as to the retaliation claim in acknowledging that he engaged in a protected activity when he filed a complaint and suffered an adverse employment action when he was denied the stipend.[45] As for the harassment count, the court agreed that evidence established that the faculty member was subjected to repeated unwelcome sexual advances and, as a result, suffered mental and physical effects.

A secretary at a college in Illinois unsuccessfully filed suit including a title VII sex discrimination claim after she received a five-day suspension for a mistaken entry on her time card. The Seventh Circuit reversed a federal trial court's finding that the secretary failed to establish a prima facie case under *McDonnell Douglas* since it thought that the five-day suspension constituted an adverse employment action.[46] However, the court decreed that the supervisor's actions did not constitute a hostile working environment because there was no pattern of continued discriminatory misconduct and the employee was not retaliated against for filing a complaint.

In Indiana, a visiting professor filed suit against a university for title VII sexual harassment and retaliation after objectionable files were placed on his computer. In response to the faculty member's claim that after he filed a complaint his contract was not renewed for the next year, university officials countered that he was dismissed for poor teaching evaluations. A federal trial court granted the university's motion for summary judgment in reiterating that sexual subject matter does not equal sexual harassment.[47] The court was of the opinion that title VII applies when a member of one sex is subject to disadvantageous terms or conditions of employment. The court decided that since no objective person would have been offended by the files on the faculty member's computer, they did not create a hostile work environment. As to the retaliation claim, the court rejected the faculty member's argument that he was "blacklisted" or suffered an adverse employment action since he was able to obtain subsequent employment in a university setting.

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[44] Mukaida v. Hawaii, 159 F. Supp.2d 1211 [156 Educ. L. Rep. 968] (D. Haw. 2001).

[45] Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512 [156 Educ. L. Rep. 448] (5th Cir. 2001).

[46] Russell v. Bd. of Trs. of the Univ. of Ill. at Chi., 243 F.3d 336 [151 Educ. L. Rep. 803] (7th Cir. 2001).

Immunity

In 2001, the Eighth Circuit reviewed two cases on whether Eleventh Amendment immunity barred title VII claims against a state. The first case involved three consolidated actions brought by faculty and staff at a university in Arkansas who alleged title VII sex discrimination claims. In each case, the federal trial courts held that title VII claims were not barred by the Eleventh Amendment. On further review, the Eighth Circuit affirmed that Congress expressed its unequivocal intent to abrogate immunity and acted pursuant to its constitutional authority under the Fourteenth Amendment.[48]

About two months later, the Eighth Circuit issued its second opinion in a case that originated almost thirty years ago where female faculty members filed a class action suit against a university for sexual discrimination in compensation. In 1980, the federal trial court in Minnesota entered a consent decree in the dispute. Three years later, a male faculty member unsuccessfully filed a title VII suit alleging a discriminatory pay structure based on sex. In an interlocutory appeal, the Eighth Circuit reviewed both the trial court's denial of legislative immunity to the members of the board of regents who approved the consent decree and whether the title VII claim of the male faculty member was barred by the Eleventh Amendment. The court affirmed that the regents do not qualify as legislators within the meaning of the legislative-immunity doctrine because their main task is to oversee the university's operation.[49] Turning to Eleventh Amendment abrogation of title VII claims, the court agreed that, since under a *Garrett* analysis Congress clearly abrogated state's immunity when it enacted title VII and its subsequent amendments, the suit could proceed.

A female who applied unsuccessfully for a tenure-track faculty position filed a title VII sex discrimination claim both because someone in the department rewrote the job description to exclude her and since she was not interviewed for the job. A federal trial court in Pennsylvania granted the university's motion to dismiss based on Eleventh Amendment immunity in light of its being a public employer and a component of a state agency for higher education.[50]

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[47] Lutz v. Purdue Univ., 133 F. Supp.2d 1101 [152 Educ. L. Rep. 588] (N.D. Ind. 2001).

[48] Okruhlik v. Univ. of Ark., 255 F.3d 615 [155 Educ. L. Rep. 101] (8th Cir. 2001).

[49] Maitland v. Univ. of Minn., 260 F.3d 959 [156 Educ. L. Rep. 441] (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1300 (2002).

Employees

Nontenured Faculty

In Kentucky, a community college dismissed an adjunct faculty member for using objectionable racial terms as part of his speech communications course. On further review of the dismissal of the faculty member's section 1983 claim, which alleged retaliation for exercising his First Amendment rights, the Sixth Circuit affirmed in favor of the college.[51] Utilizing the tests in *Pickering*[52] and *Connick*[53] regarding speech of public concern, the court agreed that the faculty member's speech was germane to the subject matter of his lecture on the effect of language and was limited to an academic discussion of the words in question. In balancing the right to free speech against the interest of the employer, the court noted that only one student objected to the speech and that the faculty member continued to teach the rest of the semester without incident. Even so, the court remanded the case to allow officials to attempt to show that the faculty member's contract was not renewed for permissible academic reasons.

The Supreme Court of Vermont affirmed a grant of summary judgment in favor of a college in a breach of contract and title VII racial discrimination case filed by an adjunct faculty member who was dismissed for misrepresentation because he failed to disclose that he was a convicted felon on his employment application.[54] The court agreed that while the contract could not be terminated before its expiration absent probable cause, the misrepresentation constituted probable cause. The court rejected the faculty member's argument that he had no obligation to disclose his criminal history since the application did not specifically ask about it, and it ruled that partial disclosure can be a basis for fraud. The court quickly disposed of the title VII claim since the faculty member failed to establish the elements of a prima facie case of discrimination.

Denial of Tenure

Each year numerous cases are litigated by faculty members addressing concerns about the promotion and tenure process. Courts often shy away from second-guessing a university's evaluation of a faculty member's work product, but insure that the procedures are followed and no discriminatory factors are considered. The typical causes of action center around either a breach of contract or a type of discrimination protected by title VII.

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[50] O'Hara v. Ind. Univ. of Pa., 171 F. Supp.2d 490 [159 Educ. L. Rep. 78] (W.D. Pa. 2001).

[51] Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 [156 Educ. L. Rep. 415] (6th Cir. 2001).

[52] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[53] Connick v. Myers, 461 U.S. 138 (1983).

[54] Sarvis v. Vt. State Coll., 772 A.2d 494 [154 Educ. L. Rep. 225] (Vt. 2001).

Breach of Contract

In 2001, state courts reviewed three breach of contract cases. The first two addressed whether universities acted arbitrarily and capriciously. Where a tenure-track faculty member who was denied tenure filed suit challenging the university's action as arbitrary and capricious, a trial court in New York awarded him promotion and tenure as well as back pay. Although, on further review, an appellate panel affirmed that university officials acted arbitrarily and capriciously, it remanded in declaring that since the trial court erred in directing them to promote the plaintiff to a tenured position, the appropriate remedy was to return the matter to the university for further consideration.[55]

A faculty member at a university in Connecticut, who was denied tenure because of concerns about his lack of quality scholarship, unsuccessfully filed suit claiming both that officials breached his contract by failing to adhere to his employee manual on promotion and tenure and that they breached a covenant of good faith and fair dealing. An appellate court affirmed that since the faculty's tenure vote was an academic matter, the university was entitled to deference to enact its professional judgment and so agreed that the faculty member failed to prove that the result was arbitrary or made in bad faith.[56]

In Louisiana, a faculty member unsuccessfully filed a breach of contract suit after being denied tenure. An appellate court affirmed that since the faculty handbook did not create a contractual relationship between the university and the at-will faculty member, his claim was properly dismissed.[57]

Title VII Discrimination

In the first two cases, federal trial courts reviewed the application of *McDonnell Douglas* to insure whether plaintiffs established prima facie cases and showed a lack of pretext on behalf of their universities. An African American female faculty member at a community college in Alabama who was denied a contract in her final probationary year filed a sex and race discrimination claim under title VII. A federal trial court granted the university's motion for summary judgment because the faculty member failed to establish a prima facie case of sex discrimination insofar as the similarly situated employees against whom she compared herself were all female.[58] As to the race discrimination charge, the court discerned that the university offered non-pretextual reasons for its actions, namely, the cost savings associated with switching to part-time faculty.

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[55] Skorin-Kapov v. State Univ. of N.Y. at Stony Brook, 722 N.Y.S.2d 576 [152 Educ. L. Rep. 239] (N.Y. App. Div. 2001).

[56] Daley v. Wesleyan Univ., 772 A.2d 725 [154 Educ. L. Rep. 568] (Conn. App. Ct. 2001), *cert. denied* (2002).

[57] Stanton v. Tulane Univ. of La., 777 So. 2d 1242 [151 Educ. L. Rep. 714] (La. Ct. App. 2001), *cert. denied* (2001).

[58] Lewis v. Chattahoochee Valley Cmty. Coll., 136 F. Supp.2d 1232 [153 Educ. L. Rep. 118] (M.D. Ala. 2001).

When officials at a medical school in Texas provided an African American female faculty member additional time to achieve tenure, they simultaneously created new promotion requirements. Even so, officials rejected the faculty member's request to be reappointed as an assistant professor. After the faculty member was reduced to part-time and eventually laid-off, she filed a race discrimination suit under title VII. A federal trial court rejected the university's motion for summary judgment in concluding both that the faculty member met the elements to establish a prima facie case of discrimination and that the university's proffered reasons for not promoting her were pretextual.[59] The court questioned the timing of the reduction-in-force notice that the faculty member received since it reached her six days after her request for reappointment was denied.

The next two cases concerned religious discrimination involving Jewish faculty members who were denied tenure. Where a nontenured faculty member, who was a practicing Orthodox Jew, was denied tenure by a public university in New Jersey, she filed suit alleging religious discrimination, a hostile work environment, unlawful retaliation under title VII, and a state tort claim. On further review of a grant of summary judgment in favor of the university, the Third Circuit reversed and remanded.[60] The court decided that the faculty member established a prima facie case for a religious hostile work environment since it was unnecessary for her to show direct evidence of a harasser's motivation for discrimination to prove that she suffered intentional discrimination. As to the retaliation claim, the court was convinced that the faculty member engaged in protected activity when she wrote letters to university officials complaining about her superiors' conduct toward her and there was a causal link between the letters and her not being granted tenure.

In the second case, a Jewish faculty member who was denied tenure from a university in California sued under the state's fair employment laws. An appellate court affirmed a grant of summary judgment in favor of the university because there was no evidence of religious discrimination.[61] The court agreed that there was no record of intentional discrimination with regard to the faculty's negative tenure vote and the university's affirmative defenses were not pretextual.

When a faculty member in Kansas was denied tenure, she filed a title VII suit alleging sex discrimination and retaliation. A federal trial court granted the university's motion for summary judgment on the sexual discrimination claim, but the jury ruled in favor of the faculty member on the retaliation charge. At issue on appeal to the Tenth Circuit was whether the faculty member proved evidence of an adverse employment action. The court remarked that being removed from a dissertation committee and being denied an ad hoc appointment to the graduate faculty did not constitute an adverse employment action since such a claim cannot be based on speculative harm.[62] Under the circumstances, the court was satisfied that the university's action did not impair the plaintiff's future employment opportunities.

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[59] Glover-Dorsey v. Univ. of Tex. Med. Branch at Galveston, 147 F. Supp.2d 656 [155 Educ. L. Rep. 293] (S.D. Tex. 2001).

[60] Abramson v. William Paterson Coll. of N.J., 260 F.3d 265 [156 Educ. L. Rep. 90] (3d Cir. 2001).

[61] Slatkin v. Univ. of Redlands, 106 Cal.Rptr.2d 480 [153 Educ. L. Rep. 329] (Cal. Ct. App. 2001).

Tenured Faculty

Legal issues surrounding the dismissal of a tenured faculty member are often different from those involving a denial of tenure due to the property interest associated with earning tenure at state institutions. Faculty members at private institutions, especially those that do not award tenure, typically rely on their employment contracts to afford them protection from arbitrary dismissals.

Breach of Contract

In the first of two cases addressing the contractual rights of a tenured faculty member during the termination process, a tenured member of a law school faculty brought a breach of contract suit after his employment was terminated for acts of sexual harassment. On further review of a grant of summary judgment, and its being affirmed on behalf of the university, the Supreme Court of Pennsylvania agreed that it would not interfere with the school's decision.[63] The court was clear that its judgment was not based on its refusal to intervene in university affairs. Rather, the court noted that the faculty member's employment contract specified that any disputes would be resolved internally and free from judicial review.

A tenured faculty member of a university hospital, who was dismissed after its daily operation was relinquished to a third party because of financial exigency, filed a diversity action in federal court alleging a breach of contract for failure to provide a one-year notice prior to dismissal. On further review of the denial of the motion, the D.C. Circuit affirmed that while the relevant contract provided faculty members with continuing employment, they could be dismissed for just cause without notice.[64] The court determined that since financial exigency constituted just cause, the faculty member was not entitled to any notice prior to dismissal.

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[62] Aquilino v. Univ. of Kan., 268 F.3d 930 [158 Educ. L. Rep. 79] (10th Cir. 2001).

[63] Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418 [156 Educ. L. Rep. 254] (Pa. 2001).

[64] Katz v. Georgetown Univ., 246 F.3d 685 [152 Educ. L. Rep. 537] (D.C. Cir. 2001).

Unlike the previous two cases, the final dispute here focused on the contractual rights of tenured faculty where seven individuals sued their university after officials allegedly changed their employment status from calendar-year to academic-year appointments in breach of their individual contracts. The plaintiffs claimed that their individual contracts were independent of the collective bargaining agreement of the entire faculty. The Supreme Court of New Jersey found that the university made an implied contract specifically with the seven faculty to maintain a calendar-year appointment in exchange for their agreeing to remain on staff. Turning to whether the collective bargaining agreement superceded the individual faculty members' contracts, the court ascertained that while such agreements are preferred over "piecemeal" contracts with employees, consistent with precedent from the Supreme Court,[65] there was no absolute bar against permitting members of a bargaining unit from negotiating individual contracts as long as they did not conflict with the master agreement.[66]

Dismissal for Cause

Where a public university dismissed a tenured faculty member for insubordination, he filed suit alleging that this violated his right to First Amendment speech and association and that he was entitled to progressive discipline under the state constitution's procedural due process clause. On further review of a trial court's sustaining a hearing officer's recommendation to dismiss the faculty member, the Supreme Court of Appeals of West Virginia reversed in his behalf.[67] In rejecting the First Amendment speech claim, the court cited *Pickering*'s rationale that "academic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proprietary functions of the university."[68] However, as to due process, the court indicated that since tenure is a property interest, and in light of the faculty member's numerous years of exemplary service, his dismissal was arbitrary because progressive discipline was more appropriate.

A tenured faculty member at a law school was dismissed for allegedly changing student grades in exchange for sexual favors. After lengthy litigation, the only remaining issues were the faculty member's section 1983 claims for violations of due process and equal protection. On further review of a trial court's dismissal of the claims, the Tenth Circuit affirmed the rejection of the faculty member's allegation that he was fired for conduct, besides the sexual encounter, that had not been previously prohibited, namely having negligent social interaction with students.[69] According to the court, even if this conduct was not prohibited, the record shows that the faculty member would have still been fired solely for the student sexual encounter. The court rejected liability for collective wrongdoing by all defendants, especially since previous litigation revealed that all other defendants were individually innocent of wrongdoing.

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[65] J.I. Case Co. v. NLRB, 312 U.S. 332 (1944).

[66] Troy v. Rutgers, 774 A.2d 476 [155 Educ. L. Rep. 578] (N.J. 2001).

[67] Trimble v. W.Va. Bd. of Dir., 549 S.E.2d 294 [155 Educ. L. Rep. 906] (W. Va. 2001).

[68] *Id.* at 300 [912], citing Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).

[69] Tonkovich v. Kan. Bd. of Regents, 254 F.3d 941 [155 Educ. L. Rep. 58] (10th Cir. 2001).

In Florida, an appellate court reversed a judgment in favor of a university which dismissed a male faculty member for allegedly sexually harassing a female student. The sole issue was whether officials substituted their judgment for the findings of an ALJ. The court concurred with the faculty member that the judge's opinion was supported by substantial evidence while that of university officials relied largely on hearsay.[70]

All Employees

Collective Bargaining

An appellate court in Michigan resolved a contractual dispute between a community college and its employees over dental benefits. While the collective bargaining agreement identified a specific carrier for health and vision care, it only listed a specified level of benefits and no particular carrier for dental care. When the contract was negotiated, the dental benefits were provided through a specified insurance carrier, but during the term of the contract the college switched to a self-insured program. The union claimed that this change violated the state's collective bargaining laws that prohibited midterm bargaining. The court observed that the college had no duty to negotiate the change, which was clearly and unambiguously covered in the bargaining agreement, because the union had an opportunity to bargain for a specific dental carrier but failed to do so.[71] Moreover, the court maintained that since the contract was clear on this issue, it could only consider the college's past practice of using a specific dental carrier if it was mutually understood and accepted as modifying the contract.

In a case from Connecticut, the Second Circuit reversed the National Labor Relations Board's (NLRB) certification of a bargaining unit of security personnel at a private university.[72] The university contested the certification because the unit included shift supervisors who should have been excluded. The court reviewed the National Labor Relations Act's terms on the responsibilities of a supervisor, which included the ability to hire, transfer, reward or discipline, or resolve grievances in determining that in addition to these duties, a supervisor must employ independent judgment and exercise authority in the interest of the employer. As applied to these facts, the court held that since shift supervisors exercised supervisory powers, they should have been excluded. The court remanded the dispute to the NLRB to either decertify the bargaining unit and conduct a new election or simply remove supervisors from the unit.

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[70] Strickland v. Fla. A&M Univ., 799 So. 2d 276 [159 Educ. L. Rep. 398] (Fla. Dist. Ct. App. 2001).

[71] Gogebic Cmty. Coll. Mich. Educ. Support Personnel Ass'n. v. Gogebic Cmty. Coll., 632 N.W.2d 517 [156 Educ. L. Rep. 679] (Mich. Ct. App. 2001).

[72] NLRB v. Quinnipiac Coll., 256 F.3d 68 [155 Educ. L. Rep. 115] (2d Cir. 2001).

A civil service employee in New York unsuccessfully sought to overturn a university's reclassification of a position in mail services as a professional appointment that excluded the plaintiff from applying for a posted vacancy. An appellate court affirmed that university officials did not act arbitrarily or capriciously because the job required performance of managerial functions, including maintaining computer databases, training and supervising personnel, and accounting functions.[73]

Early Retirement Incentives & Retirement Benefits

On further review of a grant of summary judgment in a dispute over whether tenured faculty members and administrators at a university in North Dakota who participated in an early retirement program should have to pay FICA taxes, the Eighth Circuit affirmed that payments to the faculty were in exchange for relinquishing property or contract interests and not as forms of compensation.[74] Conversely, the court agreed that since administrators who did not occupy tenured appointments were at-will employees, the payments they received were taxable income.

In Missouri, retired and former employees filed a class action suit against a university, claiming that accumulated sick leave should have been credited toward their retirement compensation. An appellate court reviewed state statutes and noted that the university's board of regents had the authority to fix the compensation of its employees.[75] The court added that academic institutions were excluded from the State Personnel Law, which allowed for the accumulation of sick leave for state agencies.

Salary Distribution & Tax-deferred Investments

Community colleges alleged that their state commission failed to distribute salary enhancements in accordance with the law. The commission was to disburse the salary increases in light of a comparative salary study, but when it decided that the enhancement was insufficient to fund the salary study fully, it disbursed the money based in part on its general formula. The Supreme Court of Wyoming struck down the action in positing that any distribution of the monies, other than through the formula, violated state law.[76] The court remanded the dispute to the commission to develop a uniform method for calculating each college's salary needs and for disbursing the money on a proportional basis.

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[73] Civil Serv. Employees Ass'n Inc., Local 1000 v. State Univ. of N.Y., 730 N.Y.S.2d 573 [157 Educ. L. Rep. 281] (N.Y. App. Div. 2001).

[74] North Dakota State Univ. v. United States, 255 F.3d 599 [155 Educ. L. Rep. 90] (8th Cir. 2001).

[75] Andresen v. Bd. of Regents of Mo. W. State Coll., 58 S.W.3d 581 [159 Educ. L. Rep. 362] (Mo. Ct. App. 2001).

[76] Wyoming Cmty. Coll. Comm'n v. Casper Cmty. Coll. Dist., 31 P.3d 1242 [157 Educ. L. Rep. 352] (Wyo. 2001).

Employees from two community colleges in New York sued their employers over their alleged failure to permit the employees to contribute to their custodial accounts. In affirming the rejection of the claim, an appellate court agreed that state law authorizes, but does not mandate, the establishment of special annuity and custodial account programs for employees of community colleges.[77]

Administration & Staff

Breach of Contract

The first three of the five cases in this section dealt with whether a plaintiff was in an at-will employment relationship. If so, then a university has significantly more latitude because an employee served "at the will" of the employer. A dean of students challenged his dismissal a few weeks after his superior assured him that his job was secure. At the time he was hired, the dean received a personnel policy manual that provided that employees could be dismissed at any time without notice and cause. On further review of the dean's suit for misrepresentation and breach of contract, the Supreme Court of Rhode Island affirmed that since the deanship was an at-will position that could be terminated at any time, the plaintiff's reliance on his superior's assurance of job security was unreasonable insofar as he did not have a written contract and was aware that he could be dismissed at any time.[78]

A faculty member in a medical school who claimed that he was promised the job as chief of pulmonary medicine when he advanced to the rank of associate professor sued his university for breach of contract when he was promoted but was not appointed to the position. A federal trial court in Georgia decreed that there could be no breach of contract claim for such an at-will leadership position.[79]

In Iowa, a basketball coach at a community college who was suspended indefinitely with pay but later left of his own accord had a provision in his contract stipulating that he could be dismissed at any time. In the coach's suit alleging due process violations and breach of contract, a federal trial court granted the college's motion for summary judgment on the breach claim because he served at the pleasure of the board.[80] Further, since the coach was an at-will employee, the court pointed out that due to his lack of a property interest in the position, he was not entitled to due process protections.

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[77] Roenke v. State Univ. of N.Y., 726 N.Y.S.2d 771 [155 Educ. L. Rep. 749] (N.Y. App. Div. 2001).

[78] Galloway v. Roger Williams Univ., 777 A.2d 148 [155 Educ. L. Rep. 1287] (R.I. 2001).

[79] Murtagh v. Emory Univ., 152 F. Supp.2d 1356 [156 Educ. L. Rep. 156](N.D. Ga. 2001).

[80] Kish v. Iowa Cent. Cmty. Coll., 142 F. Supp.2d 1084 [154 Educ. L. Rep. 795] (N.D. Iowa 2001).

A dispute involving the statute of frauds makes a strong case as to why contracts need to be in writing. In Texas, a dismissed coach sued his university for breach of contract and fraud, citing an oral promise that he would receive a multi-year contract. The university filed a motion for summary judgment, alleging that the statute of frauds barred the claims. An appellate court explained that in order to invoke promissory estoppel where there is an oral promise to sign an agreement, the agreement of which is the subject of the oral promise must comply with the statute of frauds.[81] However, the court contended that no such evidence was presented to show that a two-year contract existed when the representation was made. As to the fraud count, the court wrote that the statute of frauds bars a fraud claim when a plaintiff seeks damages for the benefit of the bargain that he or she would have obtained had the promise been performed.

In New York, a faculty member unsuccessfully filed a breach of contract claim after she was removed as department chair for failing to maintain an effective communication climate. An appellate court affirmed the rejection of the chair's argument that she was unconditionally employed.[82] The court commented that in light of the collective bargaining agreement, a chair could be removed for good cause on the filing of a petition signed by two-thirds of the members of a department followed by a meeting with the dean and the department faculty.

Discrimination

Where officials at a university in Connecticut dismissed the director of the teacher education program after receiving complaints about it, she not only alleged that she was released because she disclosed that she had a grave illness but also filed suit in federal court for violations of age discrimination, title VII sex discrimination, and the ADA. In granting the defendants' motions for summary judgment, the court was of the opinion that even though the director established a prima facie case for title VII and age discrimination, she failed to establish that any of the proffered reasons for her dismissal were pretextual. As to the ADA claim, the court specified that the director was not dismissed because of her illness because officials were unaware of it at the time she was released.[83]

In Kentucky, where a female employee at a community college accepted a management position formerly occupied by a faculty member, but did not receive a faculty appointment, she filed suit under the state's Civil Rights Act alleging that officials discriminated against her because she was an unwed mother. A trial court dismissed in favor of the college based on its defense that the employee failed to apply for a faculty position. While an appellate court agreed that being an unwed mother made the employee a member of a protected class, the court affirmed because evidence showed she tried unsuccessfully to become a faculty member in the years before she became pregnant.[84]

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[81] Sonnichsen v. Baylor Univ., 47 S.W.3d 122 [154 Educ. L. Rep. 989] (Tex. App. 2001).

[82] Drucker v. Hofstra Univ., 719 N.Y.S.2d 263 [150 Educ. L. Rep. 829] (N.Y. App. Div. 2001).

[83] Soares v. Univ. of New Haven, 154 F. Supp.2d 365 [156 Educ. L. Rep. 242] (D. Conn. 2001).

The final three cases focused on retaliation for protected activity. In Texas, a female supervisor claimed that she was retaliated against for assisting female colleagues to file sexual harassment claims against their university. After the supervisor was dismissed due to a departmental reorganization, she filed a sexual discrimination and retaliation suit under title VII. On further review of a judgment in favor of the supervisor, the Fifth Circuit reversed in favor of the university with regard to retaliation because the supervisor did not introduce evidence of a causal connection between her protected activities and her being discharged.[85] The court believed that the supervisor could not show that "but for" her helping other women file grievances she would not have been dismissed. As part of its rationale, the court considered it important that eighteen months lapsed between the last sexual harassment complaint and the reorganization.

The female coach of the women's basketball team at a university in Delaware who was dismissed for the lack of success in her program often complained about the lack of equal treatment between male and female athletes. When the coach filed a title VII sex discrimination and title IX sex equity suit, the federal trial court granted the university's motion for summary judgment.[86] The court decided that the coach did not establish a prima facie case of sex discrimination because she did not allege adverse employment actions taken specifically against her as a coach. As to retaliation, the court concluded that title VII did not prohibit retaliation against the coach for challenging the misallocation of resources in violation of title IX since they were wholly unrelated to the discriminatory employment practices alleged in her complaint.

A special events employee at a community college who claimed that he was dismissed in retaliation for filing a complaint with the civil rights commission filed suit alleging sex discrimination and retaliation under title VII as well as various state tort claims. On further review, an appellate court in Michigan overturned a verdict in favor of the employee since it did not agree that his dismissal met the statutory definition for retaliation.[87] The court asserted that there was no causal connection between the filing of the complaint and the employee's dismissal since this decision had been made before he filed his last complaint. Further, the court acknowledged that the employee failed to make a charge under the Civil Rights Act because he only raised generic, non-sex based complaints regarding his working conditions.

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[84] Tiller v. Univ. of Ky., 55 S.W.3d 846 [158 Educ. L. Rep. 454] (Ky. Ct. App. 2001).

[85] Mato v. Baldauf, 267 F.3d 444 [157 Educ. L. Rep. 532](5th Cir. 2001), *reh'g denied*, 277 F.3d 1375 (2001).

[86] Lamb-Bowman v. Del. State Univ., 152 F. Supp.2d 553 [155 Educ. L. Rep. 1174] (D. Del. 2001).

[87] Barrett v. Kirtland Cmty. Coll., 628 N.W.2d 63 [154 Educ. L. Rep. 949] (Mich. Ct. App. 2001).

Due Process

Public employees filed three suits in attempts to regain their jobs by alleging that university officials failed to adhere to a mandated process. However, in order to enjoy the benefits of the due process clause, an employee must have a property interest in the job. A university employee unsuccessfully filed a suit citing numerous causes of action originating from alleged acts of employment discrimination. At issue before the Supreme Court of Mississippi was whether the employee was entitled to procedural due process because of the university's grievance procedures. The court affirmed that since the grievance procedures were in place to resolve disputes, it did not provide protection because the plaintiff filed a grievance only after his employment was over.[88] The court upheld the dismissal of the breach of contract claim because insofar as it expired, the plaintiff was an at-will employee when he resigned.

In North Carolina, a former staff member of a university's extension program filed an employment discrimination suit that was removed to a federal court which granted the defendants' motion for summary judgment. When the employee filed another suit in state court for violations of the state's constitution, it rejected the university's contention that the claims were barred by collateral estoppel. On further review, an appellate panel reversed in favor of the university in reasoning that even though the claims were different, since the issues were the same they were barred by collateral estoppel.[89] The court discerned that the plaintiff was not deprived of a right to due process because he was an at-will employee.

A maintenance supervisor at a community college challenged his dismissal for receiving a ticket for driving under the influence of alcohol during non-work hours. While an ALJ agreed that the dismissal was an excessive punishment, the ALJ thought that the supervisor's job could be terminated at the end of the fiscal year since he had no expectation of employment after his contract expired. On further review, an appellate court in Florida declared that the ALJ deprived the employee of procedural due process because the only issue for adjudication was excessive punishment, not whether dismissal at the end of the year was proper.[90]

First Amendment Speech

A former police officer at a university alleged that he was dismissed for reporting improprieties in his department to a local newspaper while officials claimed that he was released for failing to complete his time card accurately. An appellate court in North Carolina affirmed a grant of summary judgment in favor of the university that dismissed all of the officer's claims.[91] The court agreed on the retaliation and the conspiracy counts because the dismissal was unrelated to the officer's disclosing his concerns with the department. The court maintained that the officer failed to exhaust administrative remedies with regard to his whistleblower claim.

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[88] Morrison v. Miss. Enter. for Tech., Inc., 798 So. 2d 567 [158 Educ. L. Rep. 916] (Miss. 2001).

[89] McCallum v. N.C. Coop. Extension Service of N.C. State Univ., 542 S.E.2d 227 [151 Educ. L. Rep. 683] (N.C. Ct. App. 2001).

[90] Creel v. Dist. Bd. of Trs. of Brevard Cmty. Coll., 785 So. 2d 1285 [155 Educ. L. Rep. 945] (Fla. Dist. Ct. App. 2001).

Tort Liability

Tort law provides remedies to a party who was injured by either an intentional or negligent act. In the first of two cases related to the intentional tort of defamation, a clinical instructor sued her university and administrators after she did not win a teaching award. The instructor learned that her department chair sent a letter to the awards committee indicating general problems with her and that she was being removed from overseeing student clinical activities. The instructor unsuccessfully filed section 1983 and pendent state charges in federal court that were dismissed and awaiting appeal when she sought to transfer the defamation claim to a state venue. An appellate court in Pennsylvania was convinced that although such a transfer was not time barred, the letter was not defamatory since it was directed to a particular audience whose job it was to evaluate employees' performance.[92] At the same time, since the letter did not specify the precise nature of the problems, the court ruled that the instructor's reputation could not be harmed and others would not have been deterred from associating with her.

Where a university employee in Maryland charged a peer with plagiarizing his research, an internal investigation revealed that the allegations were unsubstantiated. Consequently, the university reached a settlement with the accused employee and wrote a letter of apology as part of the agreement. When the letter of apology was made public, the accused employee filed suit for defamation, false light invasion of privacy, and unreasonable publicity. On further review of the university's having been granted a motion for summary judgment based on the absolute privilege relating to statements or documents made during judicial proceedings, an appellate court affirmed that the letter was written to parties in the litigation pursuant to the settlement agreement.[93] Moreover, the court noted that the public interest in free disclosure during a settlement outweighed the harm to the individual who claimed to have been defamed.

A university and administrators sued a former faculty member for invasion of privacy over his creation of website pages and email accounts that had the appearance of an association with the university. An appellate court affirmed both a grant of summary judgment in favor of the university and the permanent injunction that had been entered against the faculty member. On further review, the Supreme Court of Indiana found that only individuals, not corporations such as the university, are entitled to recover for an invasion of privacy.[94] Even so, the court agreed that the faculty member's actions were a misappropriation of a corporation's name or likeness that could be remedied under the state's unfair competition and trademark statutes.

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[91] Swain v. Elfland, 550 S.E.2d 530 [156 Educ. L. Rep. 322] (N.C. Ct. App. 2001).

[92] Constantino v. Univ. of Pittsburgh, 766 A.2d 1265 [151 Educ. L. Rep. 525] (Pa. Super. Ct. 2001).

[93] Sodergren v. John Hopkins Univ. Applied Physics Lab., 773 A.2d 592 [154 Educ. L. Rep. 868] (Md. Ct. Spec. App. 2001).

Negligence

Curiously, only one state court case involved negligence in 2001. A visitor at a college who became drunk after attending a party in a residence hall was sexually assaulted. The guest filed a negligence claim against the college, alleging vicarious liability because its employees, namely the student who was both a resident assistant (R.A.) and a part-time security guard, owed her a duty of protection. A federal trial court in Iowa determined that insofar as the guest who was assaulted was unable to demonstrate that she had a special relationship with the college or the R.A., her presence did not give rise to a duty to protect her from harm.[95] The court added that even if a such a duty existed, the breach was not the proximate cause of the guest's injuries since the third party's committing the crime was the superseding cause of harm.

Insurance

As demonstrated by the next two cases, the role of insurance in tort liability cannot be overstated. Where a university leased a facility to conduct its commencement exercises, officials failed to comply with their contract and secure a general liability policy. After a spectator was injured at the commencement and sued the owner of the facility, the facility's insurance company settled the claim, and, in turn, unsuccessfully sought restitution from the university. On further review of the breach of contract suit, an appellate court in New York reversed in favor of the university on the basis that it was not liable to the facility or its preexisting liability insurer for the cost of settling the claim.[96] The court indicated that the facility's owner was aware of the university's failure to secure insurance and relied on its own liability insurance provider for coverage.

Where a class action suit against a university in Tennessee was settled nearly fifty years after researchers conducted experiments on pregnant women, it sought indemnification from its insurers. A insurer which refused to reimburse the university, claiming it was not notified of these experiments, sought a declaratory judgment to evaluate the extent of its liability. A federal trial court granted the insurer's motion for summary judgment premised on the university's failure to timely notify the insurer. On further review, the Sixth Circuit affirmed that the policy required university officials to notify the insurer as soon as practicable.[97] The court observed that officials should have been aware of a number of facts that would suggest to a prudent person that the experiments might reasonably have been expected to produce a claim.

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[94] Felsher v. Univ. of Evansville, 755 N.E.2d 589 [157 Educ. L. Rep. 289] (Ind. 2001).

[95] Freeman v. Busch, 150 F. Supp.2d 995 [155 Educ. L. Rep. 1116] (S.D. Iowa 2001).

[96] Carnegie Hall Corp. v. City Univ. of N.Y., 729 N.Y.S.2d 93 [156 Educ. L. Rep. 288] (N.Y. App. Div. 2001).

Contract Liability

When a former employee entered into an agreement with his university to settle an age discrimination claim, the IRS did not consider it to be taxable income. Yet, a year later, after the Supreme Court held that settlement payments for such claims were taxable income,[98] the employee unsuccessfully sought to rescind the agreement based on mutual mistake. Reasoning that both parties must be mistaken at the time the contract was made, the Supreme Court of Kansas remarked since that there was no mistake as to the law when the settlement was agreed on, a subsequent change did not justify rescission on the basis of mutual mistake.[99]

In a second case from Kansas, a season ticket holder of a men's basketball team sued a university for breach of contract after its athletic department increased prices. On further review of a grant of summary judgment in favor of the university, an appellate court affirmed that the season ticket contract constituted a license agreement that afforded the ticket holder the option to maintain the seats on an annual basis or else the license would be revoked.[100] The court ascertained that the option to renew only guaranteed the use of the seat for another year and did not prohibit the university from imposing conditions, including increasing tickets prices or requiring a donation to a scholarship fund.

Workers' Compensation

A university challenged the Workers' Compensation Appeal Board's grant of benefits to the family of a faculty member who died after walking back to his office from a departmental picnic on campus. An appellate court in Pennsylvania affirmed that the family of the deceased faculty member was entitled to benefits since there was evidence that he suffered a heart attack due to activities while in the course of his employment.[101] The court ruled that the university was required to reimburse the health care provider for the full amount it expended to treat the faculty member before he died.

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[97] United States Fire Ins. Co. v. Vanderbilt Univ., 267 F.3d 465 [157 Educ. L. Rep. 542] (6th Cir. 2001).

[98] Commissioner of Internal Revenue v. Schleier, 515 U.S. 323 (1995).

[99] Krantz v. Univ. of Kan., 21 P.3d 561 [152 Educ. L. Rep. 786] (Kan. 2001).

[100] Wichita State Univ. Intercollegiate Athletic Ass'n v. Marrs, 28 P.3d 401 [155 Educ. L. Rep. 1452] (Kan. Ct. App. 2001).

Conclusion

In 2001, there were approximately eighty fewer reported higher education cases than in 2000. Not surprising, the range of topics covered in this year's chapter was a bit more narrow than prior years. Even so, the number of disputes addressing traditionally popular higher education issues remained strong, especially the continued stream of cases involving promotion and tenure.

Like any year, 2001 did have its share of interesting legal twists. For instance, universities received a large number of grants of summary judgment, especially in title VII cases where employees could not establish a prima facie case of discrimination. Further, it was surprising to see the number of cases in which immunity, especially under the Eleventh Amendment, was an issue. The Supreme Court even addressed this issue in *Garrett*, its sole higher education case in 2001.

Unlike the wealth of immunity case law, there were comparatively few cases on First Amendment issues of speech, religion, or association. Further, only one case dealt with Fourteenth Amendment equal protection and none examined any aspect of state action or the Fourth Amendment. In sum, even though 2001 was a sparse year for higher education, this may be a welcome change from the frenetic pace of change in years past.

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[101] Villanova Univ. v. Workers' Comp. Appeal Bd., 783 A.2d 366 [158 Educ. L. Rep. 726] (Pa. Commw. Ct. 2001).

8

STUDENTS IN HIGHER EDUCATION

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Introduction

Students employed a variety of causes of action during 2001, most of which included federal and state antidiscrimination statutes, breach of contract, and negligence, to challenge institutional practices or to punish officials for alleged injuries arising from their actions.

Admission or Matriculation

Cases involving admissions challenged the use of race as a criterion in admitting students to universities or programs. The federal courts consistently rejected the use of race as a basis for admissions policies if they were not narrowly tailored to establish a compelling government interest in diversifying student populations or in remedying the present effects of past discrimination.

Three cases scrutinized the use of race in admissions decisions at the University of Michigan. In the first, a federal trial court ruled that the use of race-conscious admissions policies for the college of literature, science, and the arts was not a narrowly tailored means of achieving a compelling governmental interest in remedying the present effects of past discrimination.[1]

Similarly, another federal trial court held that the desire to diversify the law school student body was insufficient to establish a compelling government interest to support the policy of considering race in admissions actions.[2] Even if race were sufficient to establish a compelling interest, the court was not satisfied that the policy, as practiced, was narrowly tailored to further that objective. The court reasoned that an alternate basis for the policy, to redress historic discrimination and societal imbalance, also did not give rise to a compelling government interest. Concluding that the use of race in admissions actions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, the court enjoined officials in the law school from using applicants' race as a factor in admissions decisions. In the third case, the Sixth Circuit granted a stay of the injunction pending the appeal of the judgment that law school officials stop using race as a criterion for admissions.[3] The court found that insufficient time existed for officials to create a new admissions policy that complied with the injunction while calculating how many offers to extend to fill the new class. The court was of the opinion that the delay in selecting candidates would have led applicants to accept admissions at other law schools, thereby diminishing the university's ability to compete with other selective schools for highly qualified applicants.

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[1] Gratz v. Bollinger, 135 F. Supp.2d 790 [152 Educ. L. Rep. 699] (E.D. Mich. 2001).

[2] Grutter v. Bollinger, 137 F. Supp.2d 821 [153 Educ. L. Rep. 186] (E.D. Mich. 2001).

[3] Grutter v. Bollinger, 247 F.3d 631 [153 Educ. L. Rep. 59] (6th Cir. 2001).

The Eleventh Circuit affirmed that the admissions policy for first-year students at the University of Georgia violated equal protection by giving disproportionately preferential treatment to non-white applicants.[4] The court assumed that while efforts by university officials to diversify the student body served a compelling interest, the admissions policy was unconstitutional because it was not narrowly tailored to achieve that interest. In its scathing analysis, the court focused on the rigid, incomplete, and arbitrary qualities of the admissions policy, writing at length about the inability of university officials to defend the elements of their policy.

In a further refinement of scrutinizing the admissions process, the Eleventh Circuit affirmed in part that when officials at the University of Georgia rejected an applicant before reaching the stage where race was a factor, the applicant was not injured in fact and lacked standing to contest the admissions process as racially discriminatory.[5] At the same time, the court maintained that a non-black plaintiff was injured and had standing to contest the admissions process when he survived the cut-off at a stage where black applicants were given extra points. The court pointed out that even though the student made the cut-off at that stage and was ultimately denied admission for failure to qualify at a later stage where race was not considered, his application was treated unequally. The panel noted that the Supreme Court has repeatedly explained that when an applicant competing for a government benefit is exposed to unequal treatment, this exposure is what constitutes the injury-in-fact and gives rise to standing.

The federal trial court in Massachusetts focused on procedural issues related to an Ethiopian citizen's claims that he was denied admission to medical school due to his race. Among other issues, the court observed that the more than two-year lag between the filing of the original complaint and the motion to amend was not an undue delay.[6]

Tuition and Fees

In the only case addressing whether a noncitizen can qualify for in-state tuition rates, the Ninth Circuit had to interpret federal immigration and trade laws in relation to California's law governing residency requirements. The Ninth Circuit addressed whether a state university may classify an alien, temporary, nonimmigrant visa holder as a nonresident for tuition purposes where a Canadian citizen entered the United States in 1996 under a "TD" nonimmigration visa and lived in California since that time. The court acknowledged that the terms of the North American Free Trade Agreement permit TD visa holders to enter the country only temporarily and require such a person to disclaim any intent to establish permanent residency. Despite this restriction on her visa, the woman insisted that California was her one and only domicile. When she sought to enter a state university tuition-free like any other California resident, officials informed the woman that she had to pay the nonresident rate due to her visa status. A federal trial court rejected the woman's section 1983 suit which alleged violations of her constitutional rights under the Supremacy Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment in asserting that a TD visa holder lacks the legal capacity to possess the requisite intent to establish domicile and thus cannot be granted residency status. On further review, the Ninth Circuit affirmed that since admission to the United States for TN/TD nonimmigrant aliens is expressly conditioned on an intent not to establish permanent residence, the woman could not satisfy the state residency requirement.[7] The court added that the state residency requirement did not violate the woman's rights under the Supremacy Clause or due process.

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[4] Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 [156 Educ. L. Rep. 829] (11th Cir. 2001).

[5] Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262 [153 Educ. L. Rep. 497] (11th Cir. 2001).

[6] Ali v. Univ. of Mass. Med. Ctr., 140 F. Supp.2d 107 [154 Educ. L. Rep. 170] (D. Mass. 2001).

Financial Aid

The only published financial aid cases concerned students seeking forgiveness of their student loan debts under bankruptcy law, specifically Chapter 7.

Bankruptcy

In response to evidence of increasing abuse of the bankruptcy process that threatened the viability of educational loan programs, Congress amended the bankruptcy code to restrict opportunities for debtors who seek to discharge student loan debt.[8] Bankruptcy cases involving student loans that were settled in 2001 focused primarily on what constituted an "undue hardship" for purposes of discharging student loan debt.

Chapter 7

Two cases affirmed that debtors with advanced degrees and no special conditions that would have prevented them from paying back their student loans were not entitled to "undue hardship" discharges. A federal bankruptcy court in Indiana took a prescriptive approach in rejecting a debtor's request to discharge her student loan debt of more than $170,000 for "undue hardship."[9] Applying the three-pronged *Brunner* test,[10] the court was of the view that the debtor failed to prove that she could not retain, based on current income and expenses, a minimal standard of living for herself and her family; that additional circumstances existed indicating that this state of affairs would likely persist for a significant portion of the loan repayment period; and that she had made a good-faith effort to repay her loans. The court determined that the debtor had not tried to make a meaningful attempt to improve her financial situation or to service her debt. Considering her education level and income, the court advised the debtor how to manage her expenses better, reduce her taxes, maximize her income, and seek money owed by her ex-husband. The court added that it would review the debtor's financial status after nine months to consider her status relative to the *Brunner* test.

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[7] Carlson v. Reed, 249 F.3d 876 [153 Educ. L. Rep. 610] (9th Cir. 2001).

[8] *In re* Mehta, 262 B.R. 35 [154 Educ. L. Rep. 197] (D.N.J. 2001).

[9] *In re* Shirzadi, 269 B.R. 664 [159 Educ. L. Rep. 218] (Bankr. S.D. Ind. 2001).

[10] Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395 [42 Educ. L. Rep. 535] (2d Cir. 1987).

The federal trial court in Massachusetts refuted a debtor's attempts to discharge her student loan debts of more than $40,000.[11] Discerning that the debtor had neither maximized her income nor minimized her expenses, the court provided specific suggestions on how she could reduce rent expense and supplement her income through evening or weekend work. As in the case from Indiana, the court could not discover any facts or circumstances unique to the debtor's case to support her request for a discharge of her loans due to undue hardship.

Given facts and circumstances to support a partial discharge of student loan debt, a federal bankruptcy court in Texas used the *Brunner* test more compassionately when a debtor tried to service her debt of more than $20,000 but could not do so because of family health and other problems.[12] Considering the debtor's history of a first husband with Alzheimer's disease, a second marriage to a gambler who incurred large debts and physically abused her, and a third husband's medical problems, the court restructured the loan repayment amount and schedule in a remedy that it thought appropriate under the circumstances. The court discharged all but about $9,000 of student loan debt in declaring that forcing repayment of the entire amount would have imposed an undue hardship on the debtor and her husband.

In a case from Washington, a federal trial court vacated and remanded a bankruptcy court's order to discharge more than $80,000 of a debtor's student loans.[13] The trial court posited that since the bankruptcy court erroneously thought it lacked the authority to issue a partial discharge under the bankruptcy code, it discharged all of the debtor's loan debt because a part of that sum would have imposed an undue hardship on the debtor. The trial court directed the bankruptcy court to consider how much of the loan would have created an undue hardship and to discharge only that portion.

A case before the federal trial court in New Jersey sought to refine the understanding of the awkward phrase "educational benefit overpayment or loan" in the bankruptcy code. The court affirmed a bankruptcy judge's interpretation that a student's nonpayment of tuition for classes was not "extension of credit" or a "loan" within the meaning of the dischargeability exception of the code.[14]

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[11] *In re* Bloch, 257 B.R. 374 [150 Educ. L. Rep. 744] (D. Mass. 2001).

[12] *In re* Barron, 264 B.R. 833 [155 Educ. L. Rep. 1207] (Bankr. E.D. Tex. 2001).

[13] *In re* Saxman, 263 B.R. 342 [155 Educ. L. Rep. 544] (W.D. Wash. 2001).

Student Rights

Freedom of Religion

Two opinions in the same case involved unsuccessful attempts to stop a performance of the play *Corpus Christi*. The play, scheduled to run in the theater of a state university in Indiana, depicts Jesus Christ as a homosexual who has sexual relations with his disciples. The plaintiffs alleged that presenting the play on campus violated the Establishment Clause by publicly endorsing anti-Christian beliefs. A trial court's memorandum decision posited that the balancing of interests favored the denial of the request for an injunction mainly because the plaintiffs were unable to show a likelihood of prevailing on the merits of their claim that the university endorsed a particular religious viewpoint.[15] On further review, the Seventh Circuit denied a motion for a stay pending the appeal of the trial court's order.[16] The fact that university officials went to great lengths to disclaim any endorsement of the viewpoints depicted in the play convinced the court that they were not hostile to Christianity. Noting that the play was a student's project to satisfy part of the requirements for his master's degree in theater, the court deferred to the discretionary authority of university officials. Although characterizing the play as "blasphemous" and "a typical product of the lunatic cultural left," the court held that its quality or lack thereof was for university officials to consider. According to the court, the federal judiciary had no more business resolving such disputes than if they were asked to address a teacher's use of a poor translation of the Bible in a religious course.

Privacy

The Supreme Court of Washington affirmed an award of $1.155 million to a former student who alleged defamation, negligence, breach of educational contract, invasion of privacy, and violations of the Family Educational Rights and Privacy Act (FERPA) in connection with an investigation into his alleged sexual assault of a female.[17] The court agreed that university officials could be liable for defamation even when statements are made internally since they were not acting in the ordinary course of their work in doing so. The court commented that officials invaded the student's privacy where the state regulation authorizing them to contact faculty members about his history of serious behavioral problems did not contemplate the investigation by nonfaculty personnel into the intimate details of his sex life. The court contended that FERPA created individual rights privately enforceable under section 1983, that private university officials acted under color of state law when they disclosed personally identifiable information about the student to the state's teacher certification agency, and that the student did not waive his FERPA rights when he applied for certification. The Supreme Court granted *certiorari*[18] to consider whether a student may sue a private institution for damages under section 1983 to enforce FERPA provisions that disallow federal funding when educational records and personally identifiable information are disclosed to unauthorized individuals or to a state agency.

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[14] *In re* Mehta, 262 B.R. 35 [154 Educ. L. Rep. 197] (D.N.J. 2001).

[15] Linnemeier [*sic*] v. Ind. Univ.–Purdue Univ. Ft. Wayne, 155 F. Supp.2d 1034 [156 Educ. L. Rep. 544] (N.D. Ind. 2001).

[16] Linnemeir [*sic*] v. Bd. of Trs. of Purdue Univ., 260 F.3d 757 [156 Educ. L. Rep. 428] (7th Cir. 2001).

[17] Doe v. Gonzaga Univ., 24 P.3d 390 [154 Educ. L. Rep. 963] (Wash. 2001).

An appellate court in Wisconsin upheld the refusal of university officials to disclose records of students and applicants to an equal opportunity agency. In so doing, the court affirmed that FERPA protected the materials as educational records and declared that state public policy prohibited disclosure.[19] The court decreed that university officials were not required to produce the students' records after redacting personally identifiable information since doing so would have forced them to create new records, which they were not required to do under federal and state law. The court concluded that there was no public policy justification to support the disclosure of information requested by unsuccessful applicants.

Discipline

Nonacademic Disciplinary Action

Reported cases involving dismissal of students for nonacademic reasons included a range of causes. Some cases involved racial or gender discrimination while others dealt with academic and judicial officials' disregard of their own rules and allegations that students were denied due process through contractual violations.

Due Process

The Supreme Court of Kentucky vacated an injunction that rendered a student-athlete eligible to play college basketball.[20] The panel ruled that a trial court abused its discretion in substituting its judgment for that of the

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[18] Gonzaga Univ. v. Doe, 24 P.3d 390 [154 Educ. L. Rep. 963] (Wash. 2001), *cert. granted*, 122 S.Ct. 865 (2002).

[19] Osborn v. Bd. of Regents of Univ. of Wis. Sys., 634 N.W.2d 563 [157 Educ. L. Rep. 869] (Wis. Ct. App. 2001).

[20] NCAA v. Lasege, 53 S.W.3d 77 [157 Educ. L. Rep. 398] (Ky. 2001).

National Collegiate Athletic Association (NCAA) over a student-athlete's intent to become a professional player in ascertaining that the NCAA had no interest in the case and declared one of its bylaws invalid. A dissenting opinion countered that the majority improperly substituted its judgment for that of the trial judge who had substantial evidence that the NCAA arbitrarily treated the student-athlete differently from other similarly positioned student-athletes.

A graduate anthropology student in Florida successfully challenged his suspension for unspecified misconduct where university officials failed to follow their own rules by not allowing him to question adverse witnesses and so failed to afford him due process.[21] Instead, officials relied only on statements in the investigation report that was written by an officer who talked with the alleged victims. The court ordered a new hearing in compliance with the university's Student Code of Conduct.

After being expelled from college for fighting, a student in Maine filed suit in the federal trial court, alleging racial discrimination and common law claims of breach of contract and tortious interference with contractual relations. Although the court focused on procedural matters related to a motion to dismiss, it permitted the suit to proceed.[22] The court found that the student, who was a Caucasian, presented claims that school officials engaged in racial discrimination against him and in favor of an Asian over the contract governing the relationship between the college and its students as well as in contracting and administering programs receiving federal funding.

A case from Minnesota addressed whether a private university violated a student's contractual and due process rights when officials removed him from his cohort group for sending unsolicited email messages to various students in his cohort. An appellate court affirmed that the student handbook did not establish a contract between the university and the student.[23] The court also agreed that officials acted fairly and in good faith when they informed the student of the reasons for his suspension, gave him notice of his hearing, offered him an opportunity to explain his actions at the hearing, and afforded him opportunities to present a proposal to join a new cohort group. The court believed that the appellant's failure to be reinstated as a student fell completely on his shoulders since he refused to submit a proposal for joining a new cohort group.

Where an alleged rapist sued his college and the student who claimed he raped her, the defendants successfully transferred venue to reflect the locus of the events and to accommodate the convenience of the parties and witnesses.[24] A federal trial court in New York reasoned that issues to be resolved include whether college officials violated title IX by predetermining the alleged rapist's guilt because he was male and violated the school's disciplinary procedural guidelines by failing to afford him a proper hearing.

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[21] Morfit v. Univ. of S. Fla., 794 So. 2d 655 [157 Educ. L. Rep. 960] (Fla. Dist. Ct. App. 2001).

[22] Goodman v. President and Trs. Bowdoin Coll., 135 F. Supp.2d 40 [152 Educ. L. Rep. 660] (D. Maine 2001).

[23] Rollins v. Cardinal Stritch Univ., 626 N.W.2d 464 [153 Educ. L. Rep. 959] (Minn. Ct. App. 2001).

Academic Dismissal

Courts willingly inserted themselves in the academic process when college and university officials appeared to have acted arbitrarily, capriciously, in bad faith, or beyond the scope of their employment. Judges otherwise refused to substitute their judgment for that of academic officials.

Breach of Contract

A former graduate research assistant brought a large, complex assortment of charges against her professor and university for inventions to which she claimed ownership. On further review, the Federal Circuit affirmed that the plaintiff was obligated to assign her inventions to the university because of language in the faculty handbook.[25] At the same time, the court reversed in acknowledging that the plaintiff had standing to sue for a correction of inventorship; presented justiciable claims against her professor under Illinois law for fraudulent concealment, breach of fiduciary duty, unjust enrichment, and breach of contract implied in law; proffered a claim against the university, under the doctrine of respondeat superior, for fraudulent concealment and breach of fiduciary duty and for a breach of express contract.

The Supreme Court of Appeals of West Virginia decided that a trial court misapplied governing law and abused its discretion in granting injunctive relief to a college wrestler that allowed him to compete during a season for which national and regional athletic associations declared him ineligible.[26] The court added that since the student-athlete's ability to participate in athletic contests was not a right recognized by state law, his cause of action for breach of contract against the athletic associations did not entitle him to injunctive relief since he had no contractual relationship with the associations.

In California, a soccer player failed in her bid to challenge an intercollegiate athletic association's rule that discouraged her from making an intraconference program transfer. After the student-athlete became dissatisfied with the quality of her university's soccer and academic programs, she charged that school officials arranged for athletes to receive fraudulent academic credit through sham classes, and sought to transfer to a neighboring institution. When university officials opposed the transfer and invoked an athletic conference rule, the student lost one year of athletic eligibility as well as athletic-related financial aid. Alleging that university officials targeted her in retaliation for her charges about the possible academic fraud, she unsuccessfully sued for breach of contract and a violation of the Sherman Antitrust Act. The Ninth Circuit affirmed that the conference rule did not have a significant anti-competitive effect because it was an alleged isolated act of retaliation, not an injury to a definable market.[27]

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[24] Cerussi v. Union Coll., 144 F. Supp.2d 265 [155 Educ. L. Rep. 198] (S.D.N.Y. 2001).

[25] Chou v. Univ. of Chi., 254 F.3d 1347 [155 Educ. L. Rep. 64] (Fed. Cir. 2001).

[26] Hart v. NCAA, 550 S.E.2d 79 [155 Educ. L. Rep. 1473] (W. Va. 2001).

A basketball player alleged multiple claims against his university, including breach of contract and defamation, after the NCAA declared him academically ineligible to compete. The Ohio Court of Claims wrote that the player's failure to maintain his academic eligibility and his voluntary withdrawal from college breached the terms of his national letter of intent.[28] The court pointed out that, in contrast, university officials kept the student-athlete on his scholarship and that he would have become eligible to participate during the next season had he chosen to remain in school. Insofar as the court was satisfied by the evidence which led it to accept claims that university officials spoke truthfully when communicating information about the player, it judged that they did not defame the player.

Due Process

A dispute from Florida addressed a procedural issue over the removal of a case from a state to a federal court where a student claimed that university officials improperly dismissed him from a Ph.D. program because he was unable to complete his qualifying examination due to chronic fatigue syndrome. After removing the case from state court to federal court, university officials sought to transfer the venue to the court nearest the campus. The Eleventh Circuit explained that a defendant could not obtain a dismissal of a removed action on the ground that when originally filed in state court, the action lacked proper venue under state law. [29]

In New York, a former engineering student unsuccessfully challenged his dismissal from a doctoral program based on his claim that faculty members misled him over whether a certain topic would be on his qualifying examination. An appellate court affirmed that the actions of officials in dismissing the student for failing his qualifying examination after two attempts were neither arbitrary nor capricious.[30] The court, deferring to the judgment of university officials with respect to the academic performance of the student, was of the view that they posted the list of subjects to be covered on the test in three locations in the department and emailed the list to all students in advance of the examination.

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[27] Tanaka v. Univ. of S. Cal., 252 F.3d 1059 [154 Educ. L. Rep. 788] (9th Cir. 2001).

[28] Williams v. Univ. of Cincinnati, 752 N.E.2d 367 [155 Educ. L. Rep. 1343] (Ohio Ct.Cl. 2001).

[29] Hollis v. Fla. State Univ., 259 F.3d 1295 [156 Educ. L. Rep. 64] (11th Cir. 2001).

[30] Lusardi v. State Univ. of N.Y. at Buffalo, 726 N.Y.S.2d 202 [154 Educ. L. Rep. 640] (N.Y. App. Div. 2001).

The first of two other cases from New York illustrated a situation where a court's unwillingness to defer to the judgment of academicians proved to be an expensive lesson for the defendants. An African American graduate student sued his college and two professors, alleging that they violated title VI and section 1981 in denying him a master's degree by applying standards based in part or whole on students' race and/or ethnic origin. After a jury refused to grant compensatory damages but awarded $50,000 in punitive damages, a federal trial court set aside the verdict and granted the defendants' motion for judgment as a matter of law. On appeal, the Second Circuit reversed in observing that a jury may award punitive damages for a civil rights claim if a defendant's conduct is shown to be motivated by evil motive or intent or when it involves "reckless" or "callous indifference" to the federally protected rights of others.[31] The panel asserted that the trial court erred since it could not assess the weight of conflicting evidence, pass on the credibility of witnesses, or otherwise substitute its judgment for that of the jury. The court remanded with orders to reinstate a jury award of $50,000 in punitive damages, one dollar in nominal damages, and attorney fees as well for present and prior appeals.

Similarly, the second case from New York went against academic officials who used statistical compilations as evidence that three students cheated on examinations. An appellate court reversed the dismissal of the proceeding, positing that the honor code committee relied exclusively on the statistical compilations.[32] The court indicated that college officials ignored the fact that the statistical case was based on false assumptions that did not provide a rational basis to conclude the students had cheated. The court remarked that relying on statistical information made no sense since the students took their examinations in separate rooms under the supervision of a proctor who did not see evidence of cheating.

Gender Discrimination

In Oklahoma, a male student brought section 1983 and title IX actions against university officials, alleging his involuntary withdrawal from a nursing program was caused by gender discrimination. On further review of a grant of summary judgment in favor of the defendants, the Tenth Circuit reversed in holding that the student presented material issues of fact that precluded summary judgment.[33] The court was of the opinion that the student raised an issue of fact that the faculty's requiring him to withdraw was the result of impermissible gender discrimination rather than a careful and deliberate evaluation of his academic ability.

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[31] Tolbert v. Queens Coll., 242 F.3d 58 [151 Educ. L. Rep. 416] (2d Cir. 2001).

[32] Basile v. Albany Coll. of Pharmacy, 719 N.Y.S.2d 199 [150 Educ. L. Rep. 474] (N.Y. App. Div. 2001).

[33] Gossett v. Okla. *ex rel.* Bd. of Regents for Langston Univ., 245 F.3d 1172 [152 Educ. L. Rep. 505] (10th Cir. 2001).

Two cases from Virginia involving the same parties concerned a female engineering student who was permanently expelled from a university. The first case involved the novel question of whether a plaintiff alleging title IX retaliation must show intentional discrimination and, if so, how to do so. After filing sexual harassment charges against her supervising professor, the student was unable to locate another faculty member to oversee her senior research project. Arguing that the faculty members refused to interact with her once they learned that she had filed a sexual harassment complaint against one of their colleagues, the student sent suggestive and hostile email messages to selected faculty members. When two of the faculty members brought sexual harassment charges against the student, she was eventually expelled. The court ruled that the student had to prove that university officials engaged in intentional acts of discrimination based on the consensual nature of title IX and the importance of ensuring that a recipient of federal funding not be rendered liable for violating the title IX "contract" without notice of its action.[34] The court declared that if retaliation is not an official institutional policy, a plaintiff must prove that officials knew of a violation but acted with deliberate indifference to it in order to prove intentional discrimination. Even so, the court denied the defendants' motions for summary judgment in part because it was troubled by the position of university officials that the student's failure to follow institutional policy that complaints be in writing, which is not a title IX requirement, essentially relieved them of any obligation to conduct a full investigation into her allegations. In stating that material issues of fact prevented granting a motion for summary judgment, the court further relied on the fact that the student repeatedly sought to obtain a waiver of the policy since she suffered from a nervous breakdown.

The second case presented the same federal trial court with another novel question over whether the Supreme Court's decision in *Alexander v. Sandoval*,[35] a case involving title VI, barred the student's claim for title IX retaliation. The court was convinced that the principles underlying the holding in *Sandoval* limited the scope of a private right of action to enforce title IX since that case established that such an action extends only to the substantive provisions contained in the statutes themselves or to valid interpretive regulations.[36] The court maintained that an individual may no longer bring suit to enforce effectuating regulations enacted pursuant to title IX that expand the scope of prohibited discrimination. Yet, the court found key the fact that the alleged discrimination was not on the basis of the student's sex. The court rejected the suggestion that title VII's definition of retaliation as a form of discrimination should guide its interpretation of discrimination in a title IX context because of the respective origins of these statutes. The court concluded that since the text of the title VII retaliation provision is markedly different from that in title IX, it would be of limited usefulness in interpreting title IX's retaliation provision.

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[34] Litman v. George Mason Univ., 131 F. Supp.2d 795 [151 Educ. L. Rep. 835] (E.D. Va. 2001).

[35] 532 U.S. 275 (2001).

[36] Litman v. George Mason Univ., 156 F. Supp.2d 579 [156 Educ. L. Rep. 592] (E.D. Va. 2001).

Federal Statutes

Students frequently used federal laws to challenge the actions of officials at state institutions. The degree of success enjoyed by students depended on how the particular fact issues of their respective cases related to the federal law they chose to rely on in seeking redress.

Americans with Disabilities Act and Section 504 of the Rehabilitation Act

The Fifth Circuit determined that the liberty interest of a medical student in Texas was not violated when university officials dismissed her from a residency program and ended her clinical privileges.[37] According to the court, the student, who suffered some degree of mental illness, did not have a due process property interest in her limited clinical privileges and the termination of her participation in the residency program did not constitute legally actionable infliction of emotional distress. At the same time, the court remanded the dispute for a consideration of whether sovereign immunity shields state universities from suits under title II of the Americans with Disabilities Act (ADA).

A student in North Carolina who was diagnosed with dissociative identity disorder sought further review of her attempt to prove unlawful discrimination against her university. The Fourth Circuit affirmed that the student failed to make a prima facie showing that she was disabled within the definition of the ADA or section 504 of the Rehabilitation Act.[38] The court reasoned that it could not uncover evidence to support the student's allegation that university officials refused to regard her as substantially limited in the major life activity of working when it removed her from a teacher certification program. The court ascertained that university officials made accommodations for the student to pursue her master's degree but removed her from the certification program because they were unwilling to permit her to work with children in an unsupervised capacity.

The federal trial court in New Jersey was of the opinion that title II of the ADA established a right to contribution in a case where a student-athlete with a learning disability alleged intentional discrimination under it and the Rehabilitation Act when he was denied an athletic scholarship.[39] Although the suit was filed against the NCAA and universities that had contact with the student-athlete, other institutions were implicated when Temple University sought to establish that title II created a right of contribution. Essentially a "misery loves company" strategy, university officials sought to implicate other schools that also declined to offer the student-athlete a scholarship because, should a court have held the NCAA and Temple liable for intentional discrimination, the other institutions would have had to share whatever damages were awarded. This intriguing case is the eighth opinion issued by the court in the course of adjudicating various claims by the same student-athlete. The heart of the case—whether states can be made to pay damages for violating title II of the ADA—remains unsettled. In an earlier version of this litigation,[40] the same court declared that the application of New Jersey's antidiscrimination law to the NCAA, a national testing service, and colleges and universities did not violate due process or the Dormant Commerce Clause.

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[37] Shaboon v. Duncan, 252 F.3d 722 [154 Educ. L. Rep. 757] (5th Cir. 2001).

[38] Davis v. Univ. of N.C., 263 F.3d 95 [156 Educ. L. Rep. 759] (4th Cir. 2001).

[39] Bowers v. NCAA, 171 F. Supp.2d 389 [159 Educ. L. Rep. 42] (D.N.J. 2001).

The federal trial court in Massachusetts observed that a dismissed medical student who sought to expunge his academic record in order to be eligible for reinstatement was not otherwise qualified to remain in school.[41] The court posited that the student failed to meet the requirement of title III of the ADA and section 504 of the Rehabilitation Act over whether university officials discriminated against him because of his disability. Instead, the court believed that the facts revealed that the student was incapable, even with reasonable accommodation, of meeting all of the academic standards in the program.

Title IX/Gender Discrimination

In South Carolina, a former female cadet at the Citadel, a public military college, unsuccessfully brought a section 1983 action against male peers for alleged gender discrimination for subjecting her to sexual harassment, intimidation, and abuse by insulting and assaulting her in a manner that went beyond any need to acclimate her to the rigors of military discipline. A federal trial court granted the defendants' motion for summary judgment on the ground that since they did not act under color of state law, they could not be liable under section 1983 for the alleged violations of the plaintiff's constitutional rights. On further review, the Fourth Circuit affirmed that college officials had not been delegated the sovereign function of training cadets for the military; that the school's status (as a senior military college entitled to certain federal benefits) did not establish that the government delegated a traditional, exclusive governmental function to it; that its receipt of state financial assistance did not establish that the male cadets acted under color of state law; and that the practice of asking upper-class cadets to help instruct and correct freshman cadets did not support the notion that their unauthorized harassment of the female was attributable to the state.[42]

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[40] Bowers v. NCAA, 151 F. Supp.2d 526 [155 Educ. L. Rep. 1138] (D.N.J. 2001).

[41] el Kouni v. Trs. of Boston Univ., 169 F. Supp.2d 1 [158 Educ. L. Rep. 592] (D. Mass. 2001).

[42] Mentavlos v. Anderson, 249 F.3d 301 [153 Educ. L. Rep. 534] (4th Cir. 2001).

In a case from Ohio where a student-athlete alleged quid pro quo sexual harassment, the Sixth Circuit affirmed that where a final judgment has already been entered indicating that no underlying sex discrimination occurred, an educational institution could not be liable under title IX for its response to discrimination that did not exist.[43] Similarly, the court agreed that section 1983 actions against institutions are not sustainable where an employee did not commit the alleged violation.

In the first of two cases from Iowa involving the same parties, a federal trial court noted that a private college was not liable in a title IX claim for monetary damages.[44] The court added that while a male faculty member's conduct toward a female student was inappropriate, disgusting, or even offensive, it could not be labeled outrageous enough to impose liability. The court subsequently addressed the lack of clarity regarding the remedies, other than monetary damages, available to title IX plaintiffs.[45] The court pointed out that the requirements for a damages action under title IX (that college officials have notice of discrimination and act with deliberate indifference) did not apply to claims for equitable relief. The court was of the view that allowing officials, especially those who acted in good faith, to address the student's complaints and to develop appropriate internal procedures was preferable to its fashioning remedies.

Torts

Students asked courts to address a variety of personal injury and other negligence torts during the past year. Published cases generally examined the duty of care university officials owed to their students, claims of educational malpractice and negligent accreditation, personal jurisdiction, and a state's "accidental failure of suit" statute.

Negligence

Where a mother in Kentucky filed a wrongful death suit against two university officials after her son died in a fire in his dormitory, a federal trial court granted the defendants' motion to dismiss for failure to state a claim. On further review, the Sixth Circuit held that allegations that an associate director of student housing's responses to the mother's inquiries about a prior fire in the same dormitory were sufficient to state a claim for intentional misrepresentation and that the associate director was not protected by immunity under state law.[46] The court asserted that when the official did not respond adequately to the mother's questions and inform her that the earlier fire was suspected arson and discouraged her from contacting the fire department to further investigate it, he should have known that she and her son, who had documented disabilities, would rely on his statements. The court contended that such reliance was a substantial factor in the student's death and contained sufficient particularity to meet the heightened pleading standards for fraud claims under state law.

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[43] Klemencic v. Ohio State Univ., 263 F.3d 504 [156 Educ. L. Rep. 779] (6th Cir. 2001).

[44] Frederick v. Simpson Coll., 149 F. Supp.2d 826 [155 Educ. L. Rep. 432] (S.D. Iowa 2001).

[45] Frederick v. Simpson Coll., 160 F. Supp.2d 1033 [156 Educ. L. Rep. 1075] (S.D. Iowa 2001).

[46] Minger v. Green, 239 F.3d 793 [150 Educ. L. Rep. 654] (6th Cir. 2001).

The estate of a graduate student who became ill during a high-altitude expedition in Tibet and died less than three months later from complications related to lung and high-altitude disease sued the faculty member who led the group for allegedly breaching his duty of care. The Ohio Court of Claims was convinced that the faculty member acted reasonably and consistently with the duty of care since medical evidence revealed that any alleged breach of duty was not the proximate cause of the student's death.[47]

A case of first impression from North Carolina considered whether university officials had an affirmative duty of care toward a student-athlete where a female member of a junior varsity cheerleading squad suffered permanent brain injury as a result of falling while participating in a pyramid stunt. When the student filed a negligence claim, both the deputy commissioner of the state industrial commission and the full commission rendered judgments in favor of the university. On further review, an appellate court reversed in favor of the student and remanded for reconsideration on the ground that university officials owed her a duty of care.[48] The court focused on the special relationship that existed between officials and the cheerleaders, who acted as official representatives of, and received benefits from, the university. The court acknowledged that since officials had a considerable degree of control over various aspects of the cheerleader's lives, they had an affirmative duty to provide a degree of care that a reasonable and prudent person would have exercised under the same or similar circumstances.

The Supreme Judicial Court of Maine addressed foreseeability where a high school student who attended a university-sponsored summer preseason soccer program sued the institution and various officials for negligence, negligent infliction of emotional distress, and breach of an implied contract after she was sexually assaulted by a man she met at a fraternity party. On further review of grants of summary judgment in favor of the defendants, the court reversed and remanded the negligence claims on the basis that officials owed the student-athlete a duty of care as a business invitee to warn and advise her about how to improve her personal safety.[49] The court maintained that the foreseeability of the sexual assault was an element of the university's duty and that genuine issues of material fact over whether officials breached their duty precluded their motion for summary judgment. At the same time, the court affirmed that the evidence did not establish an implied contract to provide a safe and secure environment.

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[47] Wight v. Ohio St. Univ., 750 N.E.2d 659 [154 Educ. L. Rep. 935] (Ohio Ct. Cl. 2001).

[48] Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 [152 Educ. L. Rep. 336] (N.C. Ct. App. 2001).

[49] Stanton v. Univ. of Me. Sys., 773 A.2d 1045 [155 Educ. L. Rep. 566] (Me. 2001).

In New York, an appellate court affirmed that college officials had a duty to warn a student about a defective window in off-campus housing to which they referred her.[50] The court explained that officials assumed responsibility for any problems that arose at the off-campus housing they arranged for their students since an "assumed duty" or a "duty to go forward" may arise once a person undertakes a course of conduct upon which another relies. Insofar as the student relied on the off-campus housing arrangement, the court agreed that officials were responsible for her injuries and accompanying damages.

An appellate court in Louisiana found that officials at a state university had a duty to implement reasonable measures to protect a student from foreseeable criminal acts where he alleged that his dormitory had no security cameras and university officials knew the risk of violence because of other instances that had recently occurred on campus.[51] The court decreed that the plaintiff's allegations, that officials' failure to provide adequate security measures in campus dormitories led to his being assaulted at gunpoint and robbed in his dormitory room, were sufficient to withstand an exception of vagueness.

In the first of two cases on the related topics of educational malpractice and negligent accreditation, students who were enrolled in a computerized court reporting program brought breach of contract, fraud, and negligence claims against their university and various officials for allegedly telling them that they achieved certain levels of speeds in transcribing voice dictation when they were not close to doing so. The Ohio Court of Claims, deferring to the instructional methods of the faculty and professional accreditation standards, ruled in favor of the defendants.[52] In reaching its judgment, the court took the instructor's expertise and qualifications, adjustments made to the program's method of instruction and assessment, and offers of special help for the students, including an additional or replacement instructor and transfer to other similar programs, into account. By rejecting these offers, the students illustrated what the court saw as their dissatisfaction with the instructor's teaching methods and with the program overall as a means of rationalizing their own inability to meet the demanding course requirements.

A federal court in Maine dealt with novel questions about an accreditation association's tort liability to third persons—students who sued it for having accredited the college at which they had matriculated. After completing the college's two-year program in medical assistance, the students were unable to find work because the program had deficiencies, including no clinical component. Claiming fraud and negligent misrepresentation, the students unsuccessfully alleged that the accrediting association was responsible in part for their inability to find work. The First Circuit affirmed that the plaintiffs failed to prove that language in the accreditation statement was false or misleading or that the agency had a duty to evaluate each applicable standard separately on a pass/fail basis.[53] The court remarked that controlling state law would not recognize a cause of action by or on behalf of disgruntled or former students against an accrediting association for negligent accreditation.

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[50] Frank v. Five Towns Coll., 282 A.D.2d 648 [153 Educ. L. Rep. 738] (N.Y. App. Div. 2001).

[51] Williams v. State, 786 So. 2d 927 [155 Educ. L. Rep. 969] (La. Ct. App. 2001).

[52] Lemmon v. Univ. of Cincinnati, 750 N.E.2d 668 [154 Educ. L. Rep. 944] (Ohio Ct. Cl. 2001).

In Connecticut, an unusual case involved elements of negligent counsel where the administrators of the estates of two deceased students unsuccessfully sought to reinstate a claim against a psychiatrist and Yale University. The administrators alleged that the psychiatrist's having provided inadequate care to one student caused him to murder another student and commit suicide. Even though the original events occurred in 1989, the court noted that the case had not come to trial by 2001 since the administrators' lawyer caused three dilatory behavior dismissals, including one based on his failure to attend a pretrial conference.[54] In response to this second attempt to resurrect the original case, the court commented that allowing it to continue would have defeated the basic purpose of the public policy inherent in statutes of limitation and so affirmed that the plaintiffs could not present a cause of action under the "accidental failure of suit" statute.

At issue in New Jersey was a negligence action in which a plaintiff sought personal jurisdiction over an out-of-state university when he was injured in his dormitory by a bathroom door that struck him in the face. The student unsuccessfully brought suit in New Jersey for injuries he sustained at the university's campus in Delaware. A trial court ascertained that the university's recruitment activities were not so systematic, pervasive, and continuous as to support the exercise of personal jurisdiction; the student sought further review. On further review, an appellate court affirmed in distinguishing the nature of the noncommercial educational mission of the university as a salient factor weighing against the exercise of personal jurisdiction.[55]

Worker's Compensation

An appellate court in Wisconsin affirmed that a graduate student's injury, sustained while helping a faculty member move a joist at the site of construction of the latter's home, entitled him to worker's compensation benefits.[56] The state's labor and industry review commission initially denied the injured student's request for benefits, on the basis that he was not injured while performing service growing out of, and incident to, his employment because he volunteered to help the faculty member. The court decided that since the student responded to his supervisor's request to perform a private errand, he was covered under the state's Worker's Compensation Act. Under the private errand doctrine, the court pointed out that the student's helping the faculty member was incident to his employment because the request for help came from his supervisor, was not clearly unauthorized, and would have been difficult to refuse.

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[53] Ambrose v. New England Ass'n of Schs. & Colls., 252 F.3d 488 [154 Educ. L. Rep. 745] (1st Cir. 2001).

[54] Gillum v. Yale Univ., 773 A.2d 986 [155 Educ. L. Rep. 559] (Conn. App. Ct. 2001).

[55] Severinsen v. Widener Univ., 768 A.2d 200 [151 Educ. L. Rep. 957] (N.J. Super. Ct. App. Div. 2001).

[56] Begel v. Wis. Labor & Industry Review Comm'n, 631 N.W.2d 220 [155 Educ. L. Rep. 1386] (Wis. Ct. App. 2001).

Conclusion

Trends in student higher education litigation continued along generally established paths during 2001. One exception reflected the recent paradigm shift concerning affirmative action and the use of race in admissions decisions. Reflecting the statutory changes in some states, the majority of students were increasingly successful in overturning admissions actions by state college and university officials who wanted to continue diversifying the demographics of their student populations.

That student debtors continued seeking to discharge their student loans should not be a surprise in a society in which bankruptcy cases are increasing at historical rates. While Congress amended the bankruptcy code to restrict opportunities for debtors to discharge student loan debt, courts remained mindful of the need to balance the needs of individual debtors against those of creditors. Judges appeared more willing to prescribe specific strategies for student debtors to improve their financial status and ability to repay their student loan debt rather than excuse them from their obligations.

In other areas, litigation followed a "business as usual" pattern. Students with disabilities continued to challenge institutional policies and practices in testing the limits of disability laws. Gender discrimination and sexual harassment issues further explored the definitions and limits of antidiscrimination laws.

College and university officials fought charges of negligence on a variety of fronts but primarily in the personal injury arena. Officials achieved mixed results, depending on the relationship between them and their students, the causes of action, the duties owed, and other relevant elements of tort law.

Courts continued to defer to the discretionary authority of academicians. Students generally failed in their attempts to challenge the academic discretion of college and university officials, especially when trying to establish causes of action for educational malpractice and negligent accreditation. Only when officials acted in bad faith, inconsistently with their own policies and procedures, or in clear violation of expressed or implied contracts did judges involve themselves in academic matters.

9

FEDERAL AND STATE LEGISLATION

David L. Dagley

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Introduction

This chapter provides a record of statutes related to education at the K-12 and higher education levels, passed in 2001 by the United States Congress and the legislatures of the fifty states. Legislative bodies passed approximately 2,500 pieces of education-related legislation last year. Due to restrictions in printing space, this chapter does not examine all of these acts.[1]

Federal Legislation

In 2001 Congress continued to take a more active role in legislation with respect to schooling. Arguably, the most notable legislation departs from spending powers and attempts to provide a national direction for education. This section briefly describes a few of the federal bills that were passed in 2001.

No Child Left Behind Act of 2001 (NCLB)

Paramount in the body of federal legislation was the No Child Left Behind Act of 2001 (NCLB).[2] This massive, 670-page statute represents groundbreaking redefinition of the federal government's role in K-12 education, under the guise of re-authorization of the Elementary and Secondary Education Act of 1965. The NCLB aims to create the best opportunities for the nation's children to succeed. Four broad principles are incorporated into the law: a) to strengthen accountability for children's academic achievement; b) to provide more options for parents and students, to ensure that no child loses the opportunity for a quality education; c) to allow more flexibility for states and local educational agencies in the use of federal education monies; and d) to ensure that every child can read by emphasizing teaching methods that have proven effective. NCLB was signed into law on January 8, 2002.

Higher Education Relief Opportunities for Students (HEROES) Act of 2001

HEROES authorized the secretary of education to waive or modify requirements for student financial aid under Title IV of the Higher Education Act of 1965, as required in connection with the national emergency arising from the terrorist attacks of September 11, 2001.[3] The bill provides financial relief to individuals serving on active duty, who are on National Guard duty, who reside or are employed in a disaster area, or who suffered direct economic hardship as a result of the emergency.

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[1] The author gratefully acknowledges the assistance of Ted Hardin, Randy Lane, and Lisa Stamps, doctoral students at the University of Alabama, in locating legislative acts for states where legislative reference bulletins were not available.

[2] Public Law 107-110 (Jan. 8, 2002), 115 STAT. 1425.

[3] Public Law No. 107-122 (January 15, 2002).

Veterans Education and Benefits Expansion Act of 2001

The Veterans Education and Benefits Expansion Act of 2001 amended the Montgomery GI Bill by providing a graduated increase in benefits through 2004.[4]

State Legislation

The remainder of this chapter chronicles education laws passed by the states in 2001. Topic groupings are used to provide a sense of the different types of issues with which legislatures dealt and the different approaches that they have adopted. One can secure a greater understanding of trends over several years by comparing the following information with information in the comparable chapter in previous *Yearbooks*.

Accountability and School Reform

Accountability again was a topic of great concern to legislatures, second only to school safety as the most legislated topic area. While some states added more testing requirements, legislation this year showed a turn toward granting more discretion in testing and the use of multiple measures for accountability. Reporting for accountability remained in vogue as legislatures turned to reform by both goal-setting and the introduction of more resources into the system.

Six states added more testing requirements. Delaware called for statewide annual assessments of student achievement for grades K-10.[5] Maine mandated the development of local assessment systems to measure student achievement, including portfolios, performances, and other demonstrations of learning.[6] Missouri required a specialized reading assessment program with a required reading improvement plan for third graders reading below the second-grade level and the addition of thirty hours of reading instruction during the fourth-grade year.[7] Nevada expected students to pass examinations of proficiency and achievement in reading, writing, mathematics, and science to graduate with a standard high school diploma beginning in 2004-2005.[8] New Mexico created a measure of reading proficiency for all students grades one through nine and the development of individualized reading enhancement programs for students grades two through ten who are not reading at grade level.[9] North Dakota adopted statewide, standards-based assessment in reading and mathematics in at least one grade from each of the following levels: third through fifth, sixth through ninth, and tenth through twelfth grades.[10]

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[4] Public Law No. 107-103 (December 27, 2001).

[5] DEL. CODE ANN. tit. 14, § 151 (2001).

[6] 2001 Me. Acts 454.

[7] 2001 Mo. Legis. Serv. 77 (Vernon).

[8] 2001 Nev. Stat. ch. 242.

[9] 2001 N.M. Laws 165.

Five states withdrew somewhat from legislatively directed student testing. Arizona amended provisions on student assessment to give the state superintendent of public instruction more discretion regarding standardized achievement tests.[11] California moved to minimize the amount of testing by eliminating achievement tests in content areas where a standards-based examination already exists.[12] Colorado created an alternative student achievement plan.[13] Florida amended existing performance assessment legislation by deleting language establishing the tests, their nature, and timelines and instead gave its department of education the authority to administer tests based on a schedule established by the commissioner of education.[14] Washington delayed the timelines set for student assessment in its accountability program.[15]

For the first time, testing security emerged as a concern. Louisiana required each local school board to adopt a policy establishing uniform procedures for investigating employees accused of irregularities or improprieties in the administration of standardized tests.[16] Nevada addressed security of testing materials by requiring local boards to adopt and enforce plans to ensure the security of examinations.[17]

Reporting information to the public continued as a leading accountability measure with five states adopting eight reporting-related statutes. California required local school boards to give official notice at a board meeting if a school loses its accreditation and to notify in writing each parent or guardian of pupils in a school that it has lost its accreditation.[18] California also amended accountability legislation to require reports for particularly small schools to include an explanation that the statistical certainty of reports for small schools is questionable.[19] Colorado added the requirement of reporting the number of tenured and non-tenured teachers employed and the number of professional development days used in a school board's annual report card.[20] Colorado subsequently replaced report cards with educational improvement accountability reports, which must be posted within thirty days on a website, sent to its state board of education, made available for public inspection, and filed with the public library. This legislation included charter schools as public schools required to make accountability reports.[21] Finally, Colorado exempted schools with 95 percent or more students with Individualized Education Programs (IEPs) from having a performance grade assigned to them in the state's accountability program.[22] Idaho provided that the names of K-3 schools not meeting the statewide reading achievement goals will be published on its state department of education website and in a department newsletter.[23] Missouri deleted general language requiring its state board of education to adopt a policy for public reporting of information about school districts, mandating instead that each district produce an annual school accountability report card for each of its schools and send it to any household with a student enrolled in a school.[24] Nevada required charter schools to report achievement information and adopt procedures to improve the same.[25]

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[10] 2001 N.D. Laws H.B. 1293.

[11] 2001 Ariz. Legis. Serv. 159 (West).

[12] 2001 Cal. Legis. Serv. 722 (West).

[13] 2001 Colo. Sess. Laws 126.

[14] 2001 Fla. Sess. Law Serv. 90 (West).

[15] 2001 Wash. Legis. Serv. 20 (2X) Pamph. 9 (West).

[16] 2001 La. Sess. Law Serv. 58 (West).

[17] 2001 Nev. Stat. ch. 266.

[18] 2001 Cal. Legis. Serv. 598 (West).

[19] 2001 Cal. Legis. Serv. 887 (West).

[20] 2001 Colo. Sess. Laws 78.

Two states addressed concerns about data management. Colorado directed the developer of the statewide writing assessment to return to local school boards, on their request, student responses to the essay and other portions of the examination.[26] Tennessee ordered its state department of education to provide raw test score data as soon as practicable after receipt of the data but not later than June 30.[27]

Oklahoma and Utah addressed accountability from a goal-setting perspective. Oklahoma amended the law concerning its Academic Performance Index by setting goals and timelines for establishing a formula for the index and to require a report to the governor and legislature.[28] Oklahoma also revised its Reading Sufficiency Act to set reading goals for students including the requirement that by May 1, 2007, 90 percent of all third graders will read at grade level or higher.[29] Likewise, Utah changed its long-term reading goals to require 90 percent of its third graders to read at grade level or higher by 2006.[30]

The remaining accountability-related provisions took a broader-based approach to reform, including channeling more resources into targeted functions. In its Dollars to the Classrooms Act, Florida used weighted district average grades as a measure of school performance data and required minimum classroom expenditure requirements for school districts who do not meet minimum academic performance standards.[31] Illinois required alternative education programs to specify in a student success plan the educational support needed for every student to meet state learning standards.[32] Iowa created a teacher mentoring program and a teacher career development program, teacher evaluation requirements, and a statewide team-based variable pay program to reward individual attendance centers for improvement in student achievement.[33] Kentucky created the office of executive director for its Education Professional Standards Board.[34] Louisiana ordered plans for expenditure of funds from the Education Excellence Fund to be put in priority by the Senate and House education committees and funded in that priority.[35]

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[21] 2001 Colo. Sess. Laws 330.

[22] 2001 Colo. Sess. Laws 204.

[23] 2001 Idaho Sess. Laws S.B. 1116a.

[24] 2001 Mo. Legis. Serv. 48 (Vernon).

[25] 2001 Nev. Stat. ch. 599.

[26] 2001 Colo. Sess. Laws 33.

[27] 2001 Tenn. Pub. Acts 243.

[28] 2001 Okla. Sess. Law Serv. 413 (West).

[29] 2001 Okla. Sess. Law Serv. 421 (West).

[30] 2001 Utah Laws 179.

[31] 2001 Fla. Sess. Law Serv. 157 (West).

Nevada adopted procedures for placing schools on academic probation, required the preparation and submission of a plan by its department of education for a school demonstrating the need for improvement, and made provision for a panel to supervise academic probation.[36] Tennessee passed the Teaching Scholars Education Reform Act of 2001, which requires the state board of education to establish rules regarding a reading initiative for kindergarten through eighth grade;[37] the reading initiative must have clear content and performance standards, developmentally appropriate diagnostic methods, training and support for professional development, and strategies for parental involvement. Washington passed the K-12 2000 Student Achievement Act, which addresses improvement by reducing class size, providing extended learning opportunities, assuring teacher quality by providing professional development and competitive salaries, providing early assistance for students, and giving authority to local school districts to decide the best use of achievement funds.[38]

Athletics

In 2001, six states adopted legislation concerning athletics. Arizona passed the Uniform Athlete Agents Act which requires athletic agents to register with the secretary of state, requires a contract form which includes warning language regarding loss of eligibility for student-athletes, and makes violation of its provisions a Class 1 misdemeanor subject to a $25,000 fine and revocation of registration.[39] Likewise, Tennessee enacted the Uniform Athlete Agent Act of 2001 which sets up requirements for acting as an agent and stipulates language of an agency contract, including a conspicuous warning to the athlete regarding loss of eligibility;[40] the warning about the loss of eligibility must be read aloud to the athlete before signing.

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[32] 2001 Ill. Legis. Serv. 92-42 (West).

[33] 2001 Iowa Legis. Serv. 165 (West).

[34] 2001 Ky. Rev. Stat. & R. Serv. 137 (Baldwin).

[35] 2001 La. Sess. Law Serv. 765 (West).

[36] 2001 Nev. Stat. ch. 317.

[37] 2001 Tenn. Pub. Acts 343.

[38] 2001 Wash. Legis. Serv. 3 (West).

[39] 2001 Ariz. Legis. Serv. 175 (West).

[40] 2001 Tenn. Pub. Acts 342.

Arkansas directed the study of the fairness of the classification system for championships in high school football and the necessity of developing a better play-off system.[41] California amended antidiscrimination provisions related to programming for the state's Interscholastic Federation to include religion, mental or physical disability, and any basis contained in the prohibition against hate crimes.[42] The same law prohibited voluntary interscholastic athletic associations from denying a school the opportunity to participate in activities because of its religious beliefs.

Colorado enacted legislation related to athletic activities which permits schools to charge non-enrolled students who participate in postseason competitions the actual cost of doing so. Further, a school board may, for each team activity, reserve for participation up to twice the number of starting positions on a team at each level while for individual athletic activities a board may reserve up to one-half the total number of team members at each level of competition.[43] To provisions detailing the authority of its state board of education, Kentucky added a requirement that if any agency designated to manage interscholastic athletics promulgates regulations permitting the assignment of non-teaching personnel to serve as coaches, they must apply to all sports, including basketball and football.[44] The law also affords certified employees priority over noncertified applicants.

Attendance

This section describes legislation related to school attendance and truancy prevention.

Three states lengthened the time for compulsory attendance. Iowa extended the compulsory attendance age so that students who turn sixteen on or after September 15 must still attend school until the end of the school year.[45] Louisiana raised the compulsory attendance age from seventeen to eighteen but permitted students to withdraw at age seventeen with written consent of a parent or guardian.[46] New Mexico raised the compulsory attendance age from sixteen to seventeen.[47]

Two states addressed enrollment in the early years. Indiana changed the enrollment age for kindergarten students from five-years-old by June 1 to five-years-old by July 1.[48] North Dakota permitted six-year-old students to be withdrawn from school attendance but they could not then be enrolled again until the following school year.[49]

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[41] 2001 Ark. Acts 1562.

[42] 2001 Cal. Legis. Serv. 889 (West).

[43] 2001 Colo. Sess. Laws 6.

[44] 2001 Ky. Rev. Stat. & R. Serv. 147 (Baldwin).

[45] 2001 Iowa Legis. Serv. 118 (West).

[46] 2001 La. Sess. Law Serv. 1151 (West).

[47] 2001 N.M. Laws 183.

[48] 2001 Ind. Acts 1001.

[49] 2001 N.D. Laws H.B. 1371.

Two states considered truancy reduction while one addressed the future of truancy records. Florida re-established Learnfare, a truancy-prevention program which reduces the temporary cash assistance under the welfare program for participating eligible dependent children or teenagers who are habitual truants.[50] Texas amended its compulsory attendance law to specify powers and duties of peace officers concerning truancy.[51] The legislation also gives the courts authority to punish parents who refuse to obey an order with a contempt citation and defines chronic truancy as ten or more unexcused absences in six months or three or more unexcused absences in four weeks. Washington called for the removal of truancy records from the judicial information system for students who pass the compulsory attendance age with no other case study.[52]

Two states explored additional means for checking attendance. Arkansas called for the creation of service contracts between school boards and adult education programs that offer services to sixteen- and seventeen-year-olds in order to monitor their attendance.[53] Oklahoma permitted participation in Internet-based courses as a way of satisfying compulsory attendance requirements.[54]

Two states addressed where students can attend school. Mississippi authorized dependent children of licensed school employees who are not state residents to enroll in the school district where their parents are employed.[55] New Hampshire permitted students in foster care through its department of health and human services to continue to attend their school of prior residence if a court determines that it is in the child's best interest, if the home is a reasonable distance from school, and if transportation can be arranged without imposing extra costs.[56]

Two final provisions impacted attendance considerations. Louisiana increased the number of school days in a year from 175 to 177.[57] Missouri created an inclement weather exemption to the provision for mandatory days of school attendance but limited the permissible reduction in number of school days to five.[58]

Buildings and Grounds

Nine states adopted legislation related to school buildings and grounds. Arizona created an emergency fund for materials, services, or construction expenses beyond local school budgets when local budget emergencies threaten the ability of the school district to preserve and protect property or to protect public health, welfare, or safety.[59] Arkansas directed its department of education to establish rules and regulations regarding situations where education entities act as their own general contractor and use their own employees for construction projects.[60]

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[50] 2001 Fla. Sess. Law Serv. 149 (West).

[51] 2001 Tex. Sess. Law Serv. 1514 (Vernon).

[52] 2001 Wash. Legis. Serv. 162 (West).

[53] 2001 Ark. Acts 1514.

[54] 2001 Okla. Sess. Law Serv. 427 (West).

[55] 2001 Miss. Laws 454.

[56] 2001 N.H. Laws 294.

[57] 2001 La. Sess. Law Serv. 815 (West).

[58] 2001 Mo. Legis. Serv. 2 (Vernon).

California allowed school boards to enter into "design build" contracts, thereby permitting them to take into account factors in addition to price or cost in awarding contracts for school construction in excess of $10 million.[61] California amended existing law calling for an ongoing maintenance plan to require school boards to certify a plan that includes a specified schedule for completion of major maintenance projects.[62] In a third law, California changed the relationship between school boards and city and county governments with respect to zoning ordinances. Previously, school boards could waive zoning law by a two-thirds vote of the board. Now, a board must provide forty-five days' notice and communicate a master plan for proposed facilities.[63]

In analyzing construction bids for award, Connecticut added language with respect to the "highest scoring bidder in a multiple criteria bid" to preexisting language about the "lowest responsible bidder."[64] Illinois prohibited occupation of a school building in Cook County, for which a reconstruction action plan is required by state department of education regulations, unless all remedial work is done.[65] Louisiana permitted parishes with populations between 251,000 and 253,000 to rename stadiums and buildings in honor of living persons within those parishes.[66] Louisiana also required local boards to keep unused school property in good remain, maintained, and cared for, until it is sold, leased, or otherwise disposed of.[67] Mississippi added $20 million for payment of allocations of the state Adequate Education Program funds to school districts for capital expenditures.[68]

Missouri permitted school boards to purchase apparatus, equipment, and furniture through lease-purchase agreements from capital outlay funds as long as there is a provision to terminate the agreement without penalty each year.[69] Missouri included surface parking areas as a legitimate expenditure for maintenance and repair of buildings and grounds while appropriating monies for this purpose.[70] New Mexico created the public school capital outlay task force to study and evaluate the progress and effectiveness of the prior year Public School Capital Outlay Act,[71] evaluate revenue streams, and assist in identifying deficiencies in local school buildings.[72]

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[59] 2001 Ariz. Legis. Serv. 297 (West).

[60] 2001 Ark. Acts 1204.

[61] 2001 Cal. Legis. Serv. 421 (West).

[62] 2001 Cal. Legis. Serv. 194 (West).

[63] 2001 Cal. Legis. Serv. 396.

[64] 2001 Conn. Acts 01-106 (Reg. Sess.).

[65] 2001 Ill. Legis Serv. 92-151 (West).

[66] 2001 La. Sess. Law Serv. 753 (West).

[67] 2001 La. Sess. Law Serv. 121 (West).

[68] 2001 Miss. Laws 518.

[69] 2001 Mo. Legis. Serv. 129 (Vernon).

[70] 2001 Mo. Legis. Serv. 35 (Vernon).

Curriculum Requirements

Despite the obvious need to focus curriculum goals in a standards-based environment, legislatures continued to add scattered additional curriculum requirements. Among the new requirements were special topics, health and sex education concerns, patriotism, and character education. This section details new curriculum requirements passed by the states in 2001.

Six legislatures demanded the treatment of special topics in their curricula. California directed the state librarian to allocate grants to develop Native American instructional resources for public schools.[73] Colorado designated March 31 as Cesar Estrada Chavez day in tribute to his unselfish commitment to principles of social justice and respect for human dignity.[74] Illinois amended its curricular requirements for United States history to include the role and contribution of Hispanics.[75] Maine added Maine Native American studies as an essential component of its Maine Studies program.[76] Missouri designated March 21 as "Bird Appreciation Day," to be observed by elementary and secondary schools, cities, state agencies, and civic organizations with activities designed to enhance the knowledge and appreciation of Missouri birds.[77] Missouri also required the governor to issue an annual proclamation making February "Missouri Lifelong Learning Month" during which appropriate activities will be observed in schools.[78] Texas designated the second Wednesday in May as Public School Paraprofessional Day to recognize the contributions of paraprofessionals;[79] the day is to be marked with appropriate ceremonies and activities.

Six other states addressed curricular requirements in health education and physical education. Arizona directed all school districts with sex education curricula to include information on laws related to sexual contact with minors, for pupils in grades seven through twelve.[80] The law permits each school board to develop its own course of study. Arkansas mandated that health-related education, including physical education, be given to all public school students in grades K-9.[81] Indiana required the department of education to establish a health and physical fitness program for K-12 students including cardiopulmonary resuscitation training (CPR).[82] Texas called for the establishment of local school health education advisory councils to assist boards to ensure that local community values are reflected in their health curriculum, particularly in the area of teaching about sex education.[83] The Texas legislation also permits the offering of physical education on a daily basis in grades K-6 for no more than thirty minutes a day. Utah directed its state board of education to approve instructional materials for use in the health-related curriculum adopted by local boards;[84] this act includes support for use of materials emphasizing abstinence before marriage and fidelity after marriage. Virginia required the delivery of an alcohol-abuse curriculum using materials provided by its department of alcoholic beverage control and approved by its department of education.[85]

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[71] 2000 N.M. Laws 19.

[72] 2001 N.M. Laws 338; 2001 N.M. Laws 168.

[73] 2001 Cal. Legis. Serv. 870 (West).

[74] 2001 Colo. Sess. Laws 64.

[75] 2001 Ill. Legis. Serv. 92-27 (West).

[76] 2001 Me. Acts. 403.

[77] 2001 Mo. Legis. Serv. 69 (Vernon).

[78] 2001 Mo. Legis. Serv. 66 (Vernon).

[79] 2001 Tex. Sess. Law Serv. 287 (Vernon).

[80] 2001 Ariz. Legis. Serv. 61 (West).

[81] 2001 Ark. Acts 1748.

In light of the events of 2001, it seems unusual that only four states adopted legislation related to the teaching of patriotism. Kansas required a program of patriotic observation in every school district, including instructions relating to flag etiquette, use and display, and to require that the United States flag be displayed in schools in an appropriate manner.[86] Oklahoma required instruction in the history and etiquette relating to the United States flag.[87] Oklahoma also authorized, but did not require, that students recite the Pledge of Allegiance.[88] Texas designated the last full week of classes in September each year as "Celebrate Freedom Week," during which appropriate instruction in the Declaration of Independence, the Constitution, and the Bill of Rights must occur.[89] Virginia called for all students to learn the Pledge of Allegiance and be able to demonstrate their knowledge of it.[90]

Three states adopted policy statements related to character education. Colorado encouraged the teaching of character education in public schools and issued a legislative declaration identifying core character qualities to be taught in that curriculum. The qualities include family support; community involvement; positive peer influences; motivation to achieve; respect for persons or property; common courtesy; conflict resolution; integrity; honesty; fairness; a sense of civil and personal responsibility; purpose and respect; respect for and compliance with the law; respect for parents, home, and community; dignity; and necessity of a strong work ethic.[91] Idaho recognized that the public school system should complement and supplement moral standards taught in the homes and that the primary responsibility for such instruction falls upon the home.[92] Texas now permits school boards to provide character education.[93] Character traits to be stressed in the curriculum include: courage; trustworthiness, including honesty, reliability, punctuality, and loyalty; integrity; respect and courtesy; responsibility, including accountability, diligence, perseverance, and self-control; fairness, including justice and freedom from prejudice; caring, including kindness, empathy, compassion, consideration, patience, generosity, and charity; good citizenship, including patriotism, concern for the common good and the community, and respect for authority and the law; and school pride.

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[82] 2001 Ind. Acts 1600.

[83] 2001 Tex. Sess. Law Serv. 907 (Vernon).

[84] 2001 Utah Laws 105.

[85] 2001 Va. Acts 452.

[86] 2001 Kan. Sess. Laws H.B. 2105.

[87] 2001 Okla. Sess. Law Serv. 250 (West).

[88] 2001 Okla. Sess. Law Serv. 250 (West).

[89] 2001 Tex. Sess. Law Serv. 451 (Vernon).

[90] 2001 Va. Acts. 666.

[91] 2001 Colo. Sess. Laws 276.

Five states adopted other curriculum-related legislation. Arkansas required public elementary schools to provide instruction in the subjects of visual arts *or* music for all students by June 1, 2002, and to offer art *and* music by no later than June 1, 2005 (emphasis added).[94] Indiana required "good citizenship instruction," including conflict resolution.[95] Iowa limited the amount of instruction that students in drivers' education could receive to three hours in one day.[96] Ohio detailed and described requirements for educational programs offered in alternative schools.[97] Texas amended statutory law making English the basic language of instruction in order to permit the operation of dual-language immersion programs in elementary schools.[98]

Employment

The dominant new trend in employment-related legislation was changes in certification law, especially the creation of alternative routes to certification. Many states anticipated or recognized looming teacher shortages and used alternative certification as a means of increasing the pool of teacher candidates. Some states created incentives to increase the employment pool. Other legislative changes occurred in contract and collective bargaining rights, substantive and procedural aspects of adverse employment actions, and other terms and conditions of employment.

Seven states experimented with alternative means of certifying teachers and other school employees. California authorized teacher interns to choose an early program completion option if an individual passed assessments and meets other requirements for teacher fitness.[99] California also established a Principal Training Program to provide incentive funding for administrators to receive full training.[100] Existing law requires administrators to serve two years in a full-time administrative position with a preliminary credential and completion of advanced training to be fully certified. The new program would allow local school boards to create principal training programs for themselves.

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[92] 2001 Idaho Sess. Laws HCR 1.
[93] 2001 Tex. Sess. Law Serv. 478 (Vernon).
[94] 2001 Ark. Acts 1506.
[95] 2001 Ind. Acts 1971.
[96] 2001 Iowa Legis. Serv. 32 (West).
[97] 2001 Ohio Legis. Serv. H. 196, Bulletin 10, L-1901 (Baldwin).
[98] 2001 Tex. Sess. Law Serv. 925 (Vernon).
[99] 2001 Cal. Legis. Serv. 269 (West).
[100] 2001 Cal. Legis. Serv. 697 (West).

Florida authorized its commissioner of education to award grants to teacher training institutions which create alternative certification tracks and placement services to encourage and assist mid-career professionals in making a transition into teaching.[101] Illinois permitted regional offices of education to initiate and collaborate with institutions of higher education in establishing internship programs in order to help school boards employ students with bachelor's degrees as teaching interns.[102] Illinois also created an alternative means of certification for school social work personnel for candidates who attended a program not approved by its state superintendent of education.[103] Indiana established an alternative method of certification for professionals who lack prior training in pedagogy through its "Transition to Teach" program.[104] New Mexico permitted the state board to offer alternative teacher certification.[105] Ohio allowed its state board of education to employ conditional teaching permits for uncertified teachers for two years if an individual agrees to attend and complete course work for full certification during that time.[106] Oklahoma permitted its state board of education to grant an exemption from certification requirements for superintendents in districts with unweighted average daily memberships of over 25,000 pupils.[107] Washington created a statewide partnership grant program to provide three alternative routes to certification.[108]

Six states sought ways of dealing with a shortage of teacher candidates. Louisiana allowed certified out-of-state teachers to have provisional certificates for three years, instead of one, and waived a competency examination for teachers with at least four years of service in another state and one year of service in Louisiana.[109] Louisiana also created the Teacher Shortage Incentive Program which provides $3,000 per year for four years for newly certified teachers of mathematics, biology, chemistry, physics, or special education.[110] Mississippi extended a housing loan program for teachers in critical teacher shortage areas to July 1, 2004.[111] Minnesota made it mandatory, rather than permissive, for the state certifying authority to issue licenses to persons enrolled in an accredited teacher preparation program by January 1, 2000, and who satisfactorily complete the requirements for licensure and apply for one by September 1, 2003.[112] New Mexico passed the Teacher Loan for Service Act to "proactively address the looming teaching shortage by providing students with the financial means to complete or enhance their post-secondary teacher preparation education."[113] North Dakota established a student loan forgiveness program to be administered by its state board of education for full-time students in an approved teacher education program.[114] Utah exempted public school educators from paying tuition at public institutions of higher education for courses satisfying teacher certification requirements, contingent on an institution's determining that the space is available and surplus.[115]

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[101] 2001 Fla. Sess. Law Serv. 219 (West).
[102] 2001 Ill. Legis. Serv. 92-200 (West).
[103] 2001 Ill. Legis. Serv. 92-254 (West).
[104] 2001 Ind. Acts 165.
[105] 2001 N.M. Laws 299.
[106] 2001 Ohio Legis. Serv. H. 196, Bulletin 10, L-1905 (Baldwin).
[107] 2001 Okla. Sess. Law Serv. 24 (West).
[108] 2001 Wash. Legis. Serv. 158 (West).
[109] 2001 La. Sess. Law Serv. 45 (West).
[110] 2001 La. Sess. Law Serv. 125 (West).
[111] 2001 Miss. Laws 543.

Contracts and employment relations were also altered by legislation passed in 2001. Arizona permitted three-year contracts for principals and superintendents but limited the ability of school boards to offer to extend or renegotiate them until May of the year preceding the final contract year.[116] Arizona also permitted school boards to obtain the services of employees, including teachers and administrators, by contracting with a private entity that employs personnel for boards.[117] California gave the exclusive representative for classified employees the authority to appoint classified employees to serve as a representative of classified employees, when one is to serve on a college or district task force, committee, or other governance group.[118] California also imposed the duty on school boards to deduct a fair share fee for the exclusive bargaining representative and to provide a list of home addresses of all members of bargaining units.[119]

Colorado amended legislation requiring evaluation of licensed personnel by a person with an appropriate administrative license by specifying that school boards exclusively have responsibility for the professional evaluation of superintendents.[120] Indiana gave collective bargaining rights to charter school employees.[121] Louisiana repealed a provision requiring teachers to work three additional days each school year for staff development.[122] Louisiana also required school boards to schedule and conduct school days to make up for days lost due to teacher strikes.[123] Maine permitted employment pay periods of less than twelve months when provided in the agreement between employees and the school administrative unit.[124]

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[112] 2001 Minn. Sess. Law Serv. 1 (West).
[113] 2001 N.M. Laws 288.
[114] 2001 N.D. Laws H.B. 1444.
[115] 2001 Utah Laws 292.
[116] 2001 Ariz. Legis. Serv. 379 (West).
[117] 2001 Ariz. Legis. Serv. 381 (West).
[118] 2001 Cal. Legis. Serv. 799 (West).
[119] 2001 Cal. Legis. Serv. 805 (West).
[120] 2001 Colo. Sess. Laws 25.
[121] 2001 Ind. Acts 165.
[122] 2001 La. Sess. Law Serv. 905 (West).
[123] 2001 La. Sess. Law Serv. 485 (West).
[124] 2001 Me. Acts 156.

Four states changed substantive or procedural aspects of adverse employment actions. California enacted three laws in this category. First, it permitted school boards to delegate to third-party hearing officers a consideration of whether sufficient cause exists for disciplinary action against classified employees;[125] a board retains review authority over the hearing officer's recommendation. Second, it required a permanent classified employee who accepts a promotion but fails to complete the probationary period in the new position to have retreat rights to the classification from which he or she was promoted.[126] Third, California deleted the prohibition against a school employee from serving as a non-teaching volunteer aide in the district.[127]

Iowa permitted suspensions with or without pay for a period specified by the local board after completing hearings for disciplined school employees.[128] Maryland allowed superintendents to suspend principals, teachers, and other certified personnel for cause and recommend their dismissal.[129] Mississippi altered the procedural steps for terminating teacher contracts.[130] Under the new law, teachers must be given fourteen days' notice prior to a hearing, which must be carried out in an executive session unless the teacher elects otherwise; the proceedings are confidential pursuant to applicable records laws and are to be disclosed only under court order. Tennessee added to the duties of local superintendents by directing them to recommend to their boards those teachers who are eligible for tenure or notify teachers of their failure to be reelected.[131]

Four states directed changes in their records laws. Arkansas amended its Freedom of Information Act to add state employee home addresses to the list of information items exempt from disclosure.[132] Georgia changed its public records law to exempt from disclosure personal information about public school teachers and employees, including home address and phone numbers, social security numbers, and insurance or medical information.[133] Louisiana prohibited the use of social security numbers as identification numbers for teachers and limited access to this information by outside persons.[134] Maryland forbade the printing of a school employee's social security number on any type of document except identification cards or driver's licenses.[135]

Georgia and Louisiana altered sick leave provisions. Georgia forbade teachers or other school employees from being charged for sick leave for absence due to injury caused by physical assault while engaged in professional duties;[136] there is to be no set-off for the cost of a substitute and sick leave is limited to seven days. Louisiana extended to three days the time in which teachers must provide a physician's statement to get credit for sick leave.[137]

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[125] 2001 Cal. Legis. Serv. 839 (West).

[126] 2001 Cal. Legis. Serv. 844 (West).

[127] 2001 Cal. Legis. Serv. 40 (West).

[128] 2001 Iowa Legis. Serv. 60 (West).

[129] 2001 Md. Laws 29.

[130] 2001 Miss. Laws 459.

[131] 2001 Tenn. Pub. Acts 211.

[132] 2001 Ark. Acts 1336.

[133] 2001 Ga. Laws H.B. 65, No. 1.

[134] 2001 La. Sess. Law Serv. 798 (West).

[135] 2001 Md. Laws 328.

Arkansas and Tennessee addressed planning time and duty-free lunch. Arkansas directed that a teacher who does not receive the planning time called for in state law must be compensated at his or her hourly rate of pay.[138] Arkansas also required that teachers not receiving their duty-free lunch for a minimum of 80 percent of student contact days must receive an hourly per diem rate for each missed lunch period.[139] Tennessee directed its state board of education to develop rules regarding duty-free planning time for teachers during the school day;[140] planning time must not interfere with duty-free lunch time and must total two-and-a-half hours per week. Schools are permitted to lengthen the school day to accommodate the planning time.

Two states adopted laws related to professional ethics. Iowa ordered its state board of educational examiners to address the failure of practitioners to fulfill contractual obligations.[141] Louisiana altered its state ethics law to permit former school board members with valid teaching certificates to be employed with a shorter waiting period in parishes with populations of less than 36,000 persons.[142]

Three states altered their retirement laws. California allowed dependent, unmarried children of members of the Teacher Retirement System to be eligible for benefits until age twenty-two regardless of whether they are in school.[143] Missouri directed the public school retirement systems for the state, St. Louis, Kansas City, and non-teacher retirement to recognize creditable service across all four systems.[144] South Carolina permitted retired teachers to be employed in critical need areas or in schools scoring low on accountability measures without penalty from the state retirement system.[145]

Four states discussed the relationship between testing and employment rights. Indiana prohibited the use of student scores on achievement tests as the sole basis for a school principal's performance evaluation.[146] Nebraska amended its teacher-testing law to exempt entry-level teacher or administrative certificate applicants from taking the basic skills competency examination if an applicant has three or more years of successful experience in another state or has national certification.[147] Nevada authorized reciprocal agreements exempting teachers from taking an examination for licensure if an individual has taken an acceptable examination in another state.[148] Oklahoma amended its law to require the successful completion of the professional education portion of a competency examination as a prerequisite for certification.[149]

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[136] 2001 Ga. Laws H.B. 164, No. 1.

[137] 2001 La. Sess. Law Serv. 278 (West).

[138] 2001 Ark. Acts 1208.

[139] 2001 Ark. Acts 1373.

[140] 2001 Tenn. Pub. Acts 227.

[141] 2001 Iowa Legis. Serv. 109 (West).

[142] 2001 La. Sess. Law Serv. 1127 (West).

[143] 2001 Cal. Legis. Serv. 802 (West).

[144] 2001 Mo. Legis. Serv. 130 (Vernon).

[145] S.C. CODE ANN. § 9-1-1795.

[146] 2001 Ind. Acts 1971.

[147] 2001 Neb. Laws 314e.

A listing of other employment-related legislation follows. California changed the law related to privileged and confidential information between a psychotherapist and a patient to extend it to all therapists whom the patient has reason to believe is a psychotherapist including, by name, a family therapist.[150] California also added school personnel to the list of professions for which local authorities may authorize preferential parking.[151] Florida provided a pay bonus of $50 for teachers in International Baccalaureate programs for each student scoring a four or higher on the final examination;[152] a $500 bonus was authorized where students come from D or F performing schools, with a $2,000 cap. Illinois required posting of unfilled teaching positions on the website for regional superintendents and on a local website.[153] Illinois also permitted teachers with certification in early childhood, elementary, secondary, or special education to substitute teach for up to 120 school days or 600 school hours in any one district in any one school term.[154]

Indiana required charter school teachers to have a public school license or participate in the "Transition to Teach" program.[155] Louisiana provided a $5,000 salary supplement for school counselors holding both state and national school counseling certification.[156] Also, Louisiana extended the salary increment for teachers with national certification from the National Board for Professional Teaching Standards from 2002 to 2007[157] and continued the salary increment for teachers receiving national certification who become administrators.[158] Finally, Louisiana granted permanent status to employees who are promoted to positions with higher authority after three years' probation and permitted them to retain permanent status in a lower position; this provision applies to parish populations of 425,000 or more.[159] Mississippi provided a graduated pay increase over five years for assistant teachers, from $9,365 to $12,000.[160] Minnesota required its board of teaching to accept applications for temporary teaching licenses beginning July 1 of each school year and to act on them within thirty days.[161]

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[148] 2001 Nev. Stat. ch. 22.

[149] 2001 Okla. Sess. Law Serv. 425 (West).

[150] 2001 Cal. Legis. Serv. 142 (West).

[151] 2001 Cal. Legis. Serv. 223 (West).

[152] 2001 Fla. Sess. Law Serv. 47 (West).

[153] 2001 Ill. Legis. Serv. 92-41 (West).

[154] 2001 Ill. Legis. Serv. 92-184 (West).

[155] 2001 Ind. Acts 165.

[156] 2001 La. Sess. Law Serv. 682 (West).

[157] 2001 La. Sess. Law Serv. 42 (West).

[158] 2001 La. Sess. Law Serv. 312 (West).

[159] 2001 La. Sess. Law Serv. 489 (West).

[160] 2001 Miss. Laws 1(X).

New Mexico created a statewide mentorship program for beginning teachers in providing one to three years of individualized support and assistance, structured training, formative evaluation for improvement of teaching skills, and summative evaluation for suitability for license renewal or advancement to a higher certificate level.[162] Moreover, New Mexico directed its state board of education to withhold program approval for teacher preparation programs that fail to offer a course on teaching of reading that is based on current research, aligns with state board-adopted reading standards, includes strategies and assessments to ensure that teachers are proficient at teaching reading, and was designed after seeking input from experts in the field.[163] A third statutory change in New Mexico added the requirement of six hours of courses in reading for elementary or secondary teacher certification.[164] Texas established a master technology certificate program providing an incentive stipend of $5,000 for teachers who receive a certificate.[165] Vermont required its state board of education to establish standards for issuing licensing endorsements in American Sign Language.[166]

Finance and School Business

This section lists legislation related to finance and school business management, other than general appropriations, passed in 2001. Arizona permitted budget adjustments of average daily membership if student absences for a period of one day or longer resulted from threats of violence.[167] Arkansas directed its state board of education to establish rules prohibiting public educational entities from transferring property to board members, administrators, or other school employees without adequate market value consideration.[168] The same legislation forbids giving public property worth more than $100 to leaving or retiring board members or school employees. California extended provisions for funding for necessary small schools and necessary small high schools.[169]

In order to improve financial management practices, Florida's Sharpening the Pencil Act directs county school boards to submit a five-year cycle of review of audit and management practices and that school board members be called to testify before a legislative committee if a board fails to adopt an action plan arising from the audit within ninety days.[170] Likewise, in its Outcome Based Total Accountability Act, Florida required each budget entity to submit a one-page summary of information for itself and subordinate entities regarding budget, revenue received and passed through, as well as a line item list of major activities with amount spent and unit costs for each activity.[171] Illinois amended posting notice requirements for making inter-fund transfers so that it must be given thirty days in advance.[172] In that same law, Illinois permitted regional offices of education to make inter-fund loans if they are repaid by the end of a fiscal year. Illinois also enacted the School District Validation Act to validate bonds issued to implement equitable remedies ordered by federal courts in school desegregation litigation.[173]

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[161] 2001 Minn. Sess. Law Serv. 68 (West).

[162] 2001 N.M. Laws 287.

[163] 2001 N.M. Laws 299.

[164] 2001 N.M. Laws 261.

[165] 2001 Tex. Sess. Law Serv. 1301 (Vernon).

[166] 2001 Vt. Laws 16, S.B. 25.

[167] 2001 Ariz. Legis. Serv. 329 (West).

[168] 2001 Ark. Acts 1224.

[169] 2001 Cal. Legis. Serv. 561 (West).

Louisiana established the Support Education in Louisiana First Fund with 70 percent of the funds providing for salary increases for P-12 teachers and 30 percent for salary increases for higher education faculty.[174] Missouri prohibited expenditures from capital projects funds for lease-purchase obligations unless board levies in a current year are at a tax rate sufficient to cover an expenditure.[175] South Carolina ratified a constitutional amendment authorizing a lottery and added the Education Lottery Act.[176]

Governance and School Leadership

The following list describes K-12 governance-related legislation adopted in 2001. Alabama required newly-elected or -appointed superintendents to take a course in school finance and school law and successfully pass an examination in those subjects before being seated as superintendent.[177] Under this legislation, professors of school finance and school law at Alabama institutions of higher education must also take the course and pass the examination to teach those subjects. Arizona made board members for both community school and high school districts ineligible to be candidates for or to serve simultaneously on another governing board except that an individual may run for office in the final year of service;[178] the provision previously applied only to community school district board members. Arkansas required school board members to visit frequently, no less than annually, classrooms in their districts while children are present. California required aggrieved students wishing to assert a claim against proprietary schools to provide the schools with ninety days' notice.[179]

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[170] 2001 Fla. Sess. Law Serv. 86 (West).

[171] 2001 Fla. Sess. Law Serv. 138 (West).

[172] 2001 Ill. Legis. Serv. 92-127 (West).

[173] 2001 Ill. Legis. Serv. 92-381 (West).

[174] 2001 La. Sess. Law Serv. 1 (X), 3(X).

[175] 2001 Mo. Legis. Serv. 71 (Vernon).

[176] S.C. CODE ANN. tit. 59, ch. 150.

[177] 2001 Ala. Acts 706.

[178] 2001 Ariz. Legis. Serv. 37 (West).

[179] 2001 Cal. Legis. Serv. 621 (West).

Colorado required disclosure of all master agreements, as well as any amendments, addenda, memoranda, or any document modifying a master agreement, in the Colorado School Collective Bargaining Agreement Sunshine Act.[180] Florida continued to reorganize educational governance by abolishing the board of regents and the state board of community colleges and creating divisions of colleges and universities, community colleges, public schools, and independent education in the Florida Board of Education.[181] Illinois changed the dates of quarterly meetings for regional boards of school trustees from the first Monday in the month to any day in the months of July, October, January, and April.[182] Illinois also amended requirements related to the appointment of regional superintendents to limit their service until the next general election.[183] Iowa authorized superintendents, rather than board presidents, to sign employment contracts for teachers after a board adopts a policy providing for that delegation.[184] Iowa also lifted a prohibition against compensation for school board members to permit part-time or temporary employment that does not exceed a statutory limit of $2,500 per year.[185]

Kentucky directed local school boards, on the recommendations of their superintendents, to adopt a school calendar.[186] Louisiana relinquished control over test preparation schools by not including them in the definition of propriety schools.[187] New Mexico added the duty of approving curricula and programs offered in all two-year public, postsecondary institutions to the charges of the state board of education.[188] Michigan ordered schools not to conduct classes on the Friday before Labor Day except in districts with collective bargaining agreements providing otherwise.[189] Missouri changed the requirement that a newly appointed commissioner of education must have been a state resident for at least one year to a requirement of residence on assuming the job.[190] Montana changed the petition requirement for re-opening small elementary schools from parents with three children who would attend it if re-opened, to requiring only two children to re-open;[191] the re-opening would wait until the beginning of the next school year.[192] Also, Montana added to the duties of county transportation committees by giving them the authority to decide when geographic conditions make it impractical for children to attend school in their districts of residence.[193]

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[180] 2001 Colo. Sess. Laws 72.
[181] 2001 Fla. Sess. Law Serv. 170 (West).
[182] 2001 Ill. Legis. Serv. 92-172 (West).
[183] 2001 Ill. Legis. Serv. 92-277 (West).
[184] 2001 Iowa Legis. Serv. 161 (West).
[185] 2001 Iowa Legis. Serv. 52 (West).
[186] 2001 Ky. Rev. Stat. & R. Serv. 134 (Baldwin).
[187] 2001 La. Sess. Law Serv. 140 (West).
[188] 2001 N.M. Laws 299.
[189] 2001 Mich. Pub. Acts 167.
[190] 2001 Mo. Legis. Serv. 24 (Vernon).
[191] 2001 Mont. Laws 105.
[192] 2001 Mont. Laws 237.
[193] 2001 Mont. Laws 464.

Nebraska clarified that a person may not be a board member and an employed teacher in the same district.[194] Nebraska also required board members to submit a written account of actions or decisions that might cause personal financial benefit or detriment to the accountability and disclosure commission.[195] Nevada prohibited members of boards of trustees or school board employees from accepting gifts or money from a charter school.[196] New Hampshire called for white strobe lights to be permanently mounted on the longitudinal center line of buses that must be capable of being activated or deactivated by the driver.[197] North Dakota rewrote its Century Code to reorganize, modernize, and clarify needed sections and to repeal unneeded sections.[198] Oregon permitted the use of facsimile signatures by superintendents on contracts valued $3,000 or less.[199] Texas made it a criminal offense for a school trustee, administrator, or teacher to accept a gift, favor, or service that influences the selection of a textbook.[200]

Parental and Student Rights

In the area of parental and student rights, states adopted an accommodating approach to religious exercises in schools while acknowledging the potential application of public forum analysis in permitting religious exercise and other expressive rights. Alabama required the observance of a period of quiet reflection to begin each school day.[201] Mississippi required principals and teachers to display a framed, 11″ x 14″ version of the motto "In God We Trust" in each public school classroom.[202] Montana deleted a statutory cap of two hours per week for release time for religious instruction, instead affording local school trustees discretion to set a limit.[203] North Dakota allowed students to pray aloud or participate in religious speech at any time before, during, or after the school day, to the same extent that a student may voluntarily speak or participate in secular speech.[204] In the same act, North Dakota permitted school boards to allow teachers to impose up to one minute of silence for meditation, reflection, or prayer at the beginning of each school day, allowed school boards to authorize a voluntary recitation of the Pledge of Allegiance by a teacher or one or more students at the beginning of each school day, and disallowed requiring students to recite, stand, or salute during the Pledge of Allegiance. Virginia directed its state board of education to establish guidelines for religious expression in schools and to conduct a public hearing process to obtain the views of the general public.[205]

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[194] 2001 Neb. Laws 24.

[195] 2001 Neb. Laws 14.

[196] 2001 Nev. Stat. ch. 599.

[197] 2001 N.H. Laws 81.

[198] 2001 N.D. Laws HB 1045.

[199] Or. Rev. Stat. § 326.323.

[200] 2001 Tex. Sess. Law Serv. 805 (Vernon).

[201] 2001 Ala. Acts 428.

[202] 2001 Miss. Laws 485.

[203] 2001 Mont. Laws 84.

[204] 2001 N.D. Laws H.B. 1437.

Three states applied the public forum doctrine. Arizona guaranteed equal access for military recruiters to directory information about students and allowed the same access to school property as to others.[206] Arizona also clarified the state law concerning what is considered a public secondary school for purposes of the federal Equal Access Act by specifying that it include grades seven and eight.[207] Montana allowed schools to provide lists of students to armed forces recruiters.[208] Mississippi ordered school boards to provide access to schools by voter registrars for the purpose of voter registration.[209]

Other articulations of parental and student rights adopted by the states are described below. In its Pupil Nutrition, Health, and Achievement Act of 2001, California prohibited the sale of soft drinks to elementary school students, required full meals instead of snacks during breakfast and lunch, and specified the nutritional value of snacks served during morning and afternoon breaks.[210] California also forbade high schools from assigning extra grade weighting for honors courses if they cover subjects required for admission to either state university system.[211] In additional legislation, California authorized school boards to sell computer equipment to parents within the district at cost without following bid sales procedures for the disposal of surplus property.[212] Louisiana prohibited delays in scholarship awards for students who graduate from high school in less than four years.[213] Louisiana also excluded directory information (defined as name, address, and phone number) of students in public elementary and secondary schools from public record disclosure laws.[214]

South Carolina prohibited students under eighteen years of age who unlawfully purchase a lottery ticket from being expelled, suspended, or transferred solely for doing so.[215] Texas required students to use their legal surnames according to the birth certificate or a court order changing their names.[216] Virginia prohibited the imposition of corporal punishment but not the use of incidental minor or reasonable physical contact or other actions designed to maintain control, or the use of physical force to prevent students from harming themselves or others, or for self-defense, or to obtain possession of a weapon.[217] Virginia also clarified that non-custodial parents have the right to participate in school activities unless a court order says otherwise.[218]

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[205] 2001 Va. Acts 688, 820.
[206] 2001 Ariz. Legis. Serv. 130 (West).
[207] 2001 Ariz. Legis. Serv. 263 (West).
[208] 2001 Mont. Laws 319.
[209] 2001 Miss. Laws 394.
[210] 2001 Cal. Legis. Serv. 913 (West).
[211] 2001 Cal. Legis. Serv. 386 (West).
[212] 2001 Cal. Legis. Serv. 896 (West).
[213] 2001 La. Sess. Law Serv. 1042 (West).
[214] 2001 La. Sess. Law Serv. 789 (West).
[215] S.C. CODE ANN. § 59-63-210.
[216] 2001 Tex. Sess. Law Serv. 1300 (Vernon).

Program Development

States continued to encourage program development by funding incentives or by specifying actions. Eight states enacted legislation authorizing awards of high school diplomas to veterans, two addressed reading, and two directed their attention to agricultural education. The remaining program development-related legislation represents a broad array of initiatives.

Arizona,[219] Delaware,[220] North Dakota,[221] Ohio,[222] and Pennsylvania[223] authorized awards of honorary high school diplomas for World War II veterans who did not receive their diplomas due to service in the United States armed forces. Oklahoma also authorized the issuance of diplomas for veterans of World War II, encouraging their presentation on Veterans' Day.[224] Texas allowed school boards to issue diplomas to military veterans scheduled to graduate in the years 1940-1951 but who left high school to serve in World War II.[225] West Virginia permitted the award of high school diplomas to veterans of World War I, World War II, the Korean conflict, and the Vietnam conflict who left school to serve in the armed forces.[226]

Illinois and New Mexico addressed reading programs. Illinois amended its Early Childhood Reading Improvement Block Grant program to require the application of scientifically based reading research, to establish short-term tutorial early reading intervention for the early grades, and to provide additional support for readers in grades three through six.[227] In order to receive funds targeted for reading improvement, New Mexico required schools to show that they are using quality, research-based reading programs to improve reading proficiency and are developing individualized reading plans for students who fail to meet grade level reading proficiency standards.[228] New Mexico also created the Even Start Family Literacy Program in its department of education to provide funding for preschool reading development and parenting education;[229] the department must create benchmarks and performance standards while local school boards must implement the program.

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[217] 2001 Va. Acts 588.

[218] 2001 Va. Acts 688, 820.

[219] 2001 Ariz. Legis. Serv. 56 (West).

[220] Del. Code Ann. tit. 14, § 159. (2001).

[221] 2001 N.D. Laws H.B. 1374.

[222] 2001 Ohio Legis. Serv. H. 77, Bulletin 6, L-1452 (Baldwin).

[223] Pa. Stat. Ann., tit. 24, § 16-1611.

[224] 2001 Okla. Sess. Law Serv. 157 (West).

[225] 2001 Tex. Sess. Law Serv. 187 (Vernon).

[226] W. Va. Code § 18-2-34.

[227] 2001 Ill. Legis. Serv. 92-25 (West).

[228] 2001 N.M. Laws 289.

[229] 2001 N.M. Laws 16.

Louisiana and New York addressed agricultural education. Louisiana called for the development of non-mandatory instructional strategies for the integration of agricultural education into the elementary and secondary programs of studies.[230] New York created the Agriculture in the Classroom Fund to pay for programs conducted in cooperation with its department of agriculture and markets.[231]

A listing of other program development initiatives follow. In the first of four changes, Arizona amended existing legislation requiring policies for delivery of services to students with chronic health problems to include provision of services to pupils who have an infant with a chronic health problem.[232] Second, it initiated a pilot program involving five districts to streamline, expedite, and coordinate special education services through their integration at the local level.[233] Third, it required schools qualified to, but not participating in, the federal school breakfast program to report to the state department of education the reasons why they are not involved by September 1, 2001.[234] Fourth, Arizona set up an out-of-school program through its department of economic security for youths age eleven to seventeen and gave priority to communities with high rates of pregnancy, teen violence, and delinquency.[235]

California authorized before and after school programs[236] in addition to funding the purchase of instructional materials aligned with state content standards in language arts, mathematics, history and social studies, or science, for grades K-12.[237] The purchase of instructional materials must be made within two years of adoption of content standards by its state board of education. Colorado passed legislation reducing class size in elementary grades.[238] Colorado also authorized local school boards, as part of their statutory duties and powers, to offer full-day kindergarten.[239]

Florida changed the required statewide grading scale from A = 94-100%; B = 85-93%; C = 77-84%; D = 70-76%; F = 0-69%. The new grading scale is A = 90-100%; B = 80-89%; C = 70-79%; D = 60-60%; and F = 0-59%.[240] Kentucky called for a study of the Advanced Placement Program in its high schools by a special subcommittee of the legislature,[241] mandating that the academic core be imbedded or integrated into the performance regulations for technical education students.[242] In addition, Kentucky permitted students engaged in foreign exchange study or in the congressional page program to be eligible for the Kentucky Educational Excellence Award Scholarship.[243]

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[230] 2001 La. Sess. Law Serv. 339 (West).
[231] 2001 N.Y. Laws 314.
[232] 2001 Ariz. Legis. Serv. 312 (West).
[233] 2001 Ariz. Legis. Serv. 356 (West).
[234] 2001 Ariz. Legis. Serv. 299 (West).
[235] 2001 Ariz. Legis. Serv. 345 (West).
[236] 2001 Cal. Legis. Serv. 545 (West).
[237] 2001 Cal. Legis. Serv. 914 (West).
[238] 2001 Colo. Legis. Serv. 126.
[239] 2001 Colo. Legis. Serv. 174.
[240] 2001 Fla. Sess. Law Serv. 237 (West).
[241] 2001 Ky. Rev. Stat. & R. Serv. 23 (Baldwin).

Louisiana authorized local school boards to offer instruction in personal financial management.[244] Louisiana also created a replacement early childhood program and detailed eligibility for it along with mandatory standards for classes, staffing, materials, facilities, and other resources.[245] Mississippi permitted local school boards to establish and implement vocational apprenticeship programs in high schools, with up to eight credits applying toward graduation.[246] Montana allocated funds for start-up costs for a school breakfast program.[247]

School Choice

In prior years, school choice legislation focused on the creation of charter schools. In the 2001 legislative year, only Nevada adopted new charter school legislation which prohibited the formation of a charter school from an existing public school, homeschool, or other program of home study.[248] Remaining school choice legislation tended to amend existing charter school legislation to address newly arising questions about their operation and governance. New Mexico was the only state to adopt school choice-related legislation aimed at homeschools instead of charter schools; this law amended homeschool law to require a person operating a homeschool to notify the state superintendent in writing within thirty days of establishment of a school.[249] Other school choice legislation is detailed below.

Arkansas added weighted lotteries to bring its charter school admission processes into compliance with federal desegregation orders.[250] In the first of four changes, California amended its charter school legislation to address independent study and non-classroom-based instruction by requiring its state board of education to define and adopt rules and regulations governing such teaching, and by providing funding.[251] Second, it changed requirements regarding auditing of charter schools; previously a local school superintendent was required to provide for an audit of charter school accounts by May 1 each year. Now, charter schools must transmit a copy of their audits to their chartering entity and the state department of education by December 15.[252] Third,

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[242] 2001 Ky. Rev. Stat. & R. Serv. 123 (Baldwin).

[243] 2001 Ky. Rev. Stat. & R. Serv. 25 (Baldwin).

[244] 2001 La. Sess. Law Serv. 681 (West).

[245] 2001 La. Sess. Law Serv. 1146 (West).

[246] 2001 Miss. Laws 365.

[247] 2001 Mont. Laws 437.

[248] 2001 Nev. Stat. ch. 599.

[249] 2001 N.M. Laws 62.

[250] 2001 Ark. Acts 463.

[251] 2001 Cal. Legis. Serv. 892 (West).

[252] 2001 Cal. Legis. Serv. 344 (West).

California allowed charter schools to offer independent study courses only under approval by its state board of education pursuant to rules that it would establish.[253] Fourth, California added a requirement that a reduction in apportionment caused by failure to meet the required number of days or hours be proportional to the time actually missed due to emergency closures of charter schools.[254]

Florida created the John M. McKay scholarships to permit students with disabilities who are not satisfied with their academic process to attend any other public or private, sectarian or nonsectarian school of choice, pursuant to their IEPs.[255] Indiana allowed existing public schools to become charter schools if at least 60 percent of the teachers and 51 percent of the parents approve of the transition.[256]

Louisiana passed six statutes related to charter schools. First, it permitted nonprofit organizations with exclusive authority over all employment decisions of charter schools to contract with for-profit organizations, to manage charter schools, and to delegate authority of employment decisions to the contractee management company.[257] Second, Louisiana required charter schools to submit budgets to their chartering authority and required the latter to submit budgets to the state superintendent of education.[258] Third, it required litigation costs for recovering public funds paid to charter schools to be borne by a charter school.[259] Fourth, Louisiana limited the enrollment of at-risk students in charter schools to less than 50 percent of the total enrollment.[260] Fifth, it provided for a February 15 pupil membership count to reflect enrollment changes occurring in charter schools after the October 1 count and a resultant re-allocation of funds adjusted for March until the end of the year.[261] Finally, Louisiana ordered charter schools which fail to open to refund equipment and cash-on-hand to the state or local school board.[262]

Mississippi renewed its charter school legislation by extending its existence to July 1, 2004.[263] North Carolina provided flexibility to local boards in granting leave for teachers to teach in charter schools and then return to their tenured positions.[264] Texas amended its charter school legislation to permit the commissioner of education to develop an alternative accreditation status pilot program for open enrollment charter schools;[265] the law details the relationship of an open enrollment charter school with other statutes including purchasing, nepotism, and open meeting and records laws, but does not appear to specifically define an open enrollment charter school. Utah removed the pilot program status for charter schools and authorized the creation of four additional charter schools during the 2001-2002 school year.[266]

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[253] 2001 Cal. Legis. Serv. 892 (West).
[254] 2001 Cal. Legis. Serv. 585 (West).
[255] 2001 Fla. Sess. Law Serv. 82 (West).
[256] 2001 Ind. Acts 165.
[257] 2001 La. Sess. Law Serv. 20 (West).
[258] 2001 La. Sess. Law Serv. 991 (West).
[259] 2001 La. Sess. Law Serv. 991 (West).
[260] 2001 La. Sess. Law Serv. 592 (West).
[261] 2001 La. Sess. Law Serv. 988 (West).
[262] 2001 La. Sess. Law Serv. 1076 (West).
[263] 2001 Miss. Laws 531.
[264] 2001 N.C. Adv. Legis. Serv. 462.
[265] 2001 Tex. Sess. Law Serv. 1504 (Vernon).

School Safety

School safety again led all categories in the amount of legislation passed, with ninety-four acts adopted in 2001.[267] Dominant methodologies included declaring more acts criminal, increasing the penalties for existing acts, continuing to require additional policy responses by school boards, and encouraging information exchange between schools, juvenile authorities, and parents.

Thirteen states created new criminal laws or increased penalties for criminal acts. Arkansas made communicating a false alarm bomb threat to public or private schools a Class D felony[268] while creating the offense of communicating a death threat concerning a school employee or student as a Class D felony.[269] Arkansas also made it unlawful for any person to use profane, violent, vulgar, abusive, or insulting language toward any public school employee during the course of his or her duties.[270]

California amended existing law calling for a fine or imprisonment for assault or battery in a school setting, giving a court discretion to order counseling for minor-age students.[271] Florida prohibited the location of an adult entertainment establishment within 2,500 feet of a school, making a violation a third-degree felony.[272] Illinois raised the penalty for the second violation of speeding in a school zone from a minimum fine of $150 to $300.[273] Illinois also added threats, menacing, or intimidations in nonpublic schools to its criminal code, to match the misdemeanor category of making threats, menacing, or intimidations in public schools.[274]

Indiana made communication of a threat causing the evacuation of a structure or vehicle a Class A misdemeanor and made use of school or government property to communicate such a threat a Class D felony.[275] Further, Indiana classified sexual conduct with a minor a Class A felony crime of violence and required the dismissal of state employees working with or around children if they are convicted of a Class A or B felony involving sexual misconduct with a minor.[276] Kansas included stun guns in the definition of weapons under state law.[277] Kansas also expanded the crime of unlawful sexual relations to include a teacher who engages in sexual activity with a sixteen- or seventeen-year-old student enrolled in a public or private school where an individual teaches.[278]

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[266] 2001 Utah Laws 259.

[267] There were 78 pieces of school safety legislation in 2000.

[268] 2001 Ark. Acts 567.

[269] 2001 Ark. Acts 1046.

[270] 2001 Ark. Acts 1565.

[271] 2001 Cal. Legis. Serv. 484 (West).

[272] 2001 Fla. Sess. Law Serv. 177 (West).

[273] 2001 Ill. Legis. Serv. 92-242 (West).

[274] 2001 Ill. Legis. Serv. 92-96 (West).

[275] 2001 Ind. Acts 33.

Kentucky created the following violence-related crimes: terroristic *(sic)* threatening in the first degree; making bomb threats involving schools or school property; use of weapon of mass destruction in the first and second degrees.[279] Maine added the crime of engaging in hostile, aggressive, or threatening behavior toward a student, teachers, administrators, or other staff members, punishable by a fine of $200-$500.[280] Maine also adopted a new school zone speeding law, made effective a half-hour before and after school and restricting speeds to fifteen miles per hour.[281] Nevada adopted criminal penalties for threatening to cause bodily harm or death to pupils or school employees in both public and private settings, by means of oral, written, or electronic communication.[282]

New Hampshire increased the penalties for passing a stopped school bus and passing a school bus on the right to include the potential suspension of a driver's license for thirty days.[283] Oklahoma increased the penalty for assault or battery on a school employee from one to two years and required in all schools the posting of a sign with boldface print and the following legend: "Felony charges may be filed against any person(s) committing an aggravated assault or battery upon any school employee."[284] Oklahoma also defined disorderly conduct to include "interference with the peaceful conduct of activities in an institution of learning," and extended the potential time of exclusion from the school setting from thirty days to six months.[285] Virginia made communicating threats on school property or at school events a Class 6 felony.[286] Vermont expanded the areas for which the penalty for selling illegal drugs on school buses and school grounds applies to all real property owned, leased, controlled, or subcontracted by a public or independent school.[287]

Another legislative reaction to school safety concerns has been to order school boards to adopt more restrictive policies or to give them more discretion in addressing safety issues. California added hate crimes to the list of prohibited conduct which comprehensive school safety plans must address.[288]

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[276] 2001 Ind. Acts 1942.

[277] 2001 Kan. Sess. Laws H.B. 2289.

[278] 2001 Kan. Sess. Laws H.B. 2116.

[279] 2001 Ky. Rev. Stat. & R. Serv. 113 (Baldwin).

[280] 2001 Me. Acts 189.

[281] 2001 Me. Acts 145.

[282] 2001 Nev. Stat. ch. 13 (Sp. Session).

[283] 2001 N.H. Laws 132.

[284] 2001 Okla. Sess. Law Serv. 380 (West).

[285] 2001 Okla. Sess. Law Serv. 222 (West).

[286] 2001 Va. Acts 644, 653.

[287] 2001 Vt. Laws 52 (H.B. 214).

[288] 2001 Cal. Legis. Serv. 890 (West).

California also added the definition of "destructive device" to match the definition in federal law at 18 U.S.C.§ 921 to an existing statute requiring expulsion for students who possess an explosive.[289]

Illinois permitted school boards to adopt policies providing that a student who is suspended or expelled from any public or private school in the state must complete the entire exclusion or serve it in an alternative setting.[290] Kansas allowed school boards to adopt a policy extending the school term for pupils in need of remediation or for disciplinary purposes.[291] Louisiana authorized zero tolerance policies and the attendance of parents and students in conflict resolution courses.[292] Louisiana also required each principal to prepare a school crisis management response plan designed to address school safety and the incidence of violence at school, on school buses, and at school-related activities.[293]

Maine directed each board to adopt a school bomb-threat policy and include information about bomb threats in student handbooks, including consequences.[294] Also, Maine required local boards to adopt reasonable rules to ensure safe and healthful conditions for students in public education facilities, targeting equipment, materials, and conditions found in vocational-technical education and scientific laboratories.[295] Minnesota changed the grounds for dismissal of students from behavior that "materially and substantially disrupts," to that which "significantly disrupts the rights of others or the ability of school personnel to perform their duties."[296] Mississippi called for each school board to adopt a school safety plan that must be updated annually.[297]

Nevada required each school to develop a plan for responding to threats arising in a crisis.[298] North Carolina permitted local school boards to adopt sex harassment policies, including procedures for reporting incidents and consequences for violations.[299] Texas directed that students who make a false alarm or report or terroristic *(sic)* threats be placed in alternative educational programs or expelled.[300] Utah extended its school uniform dress code policy for at least one more year but included provisions for exemptions.[301] Utah also ordered any student who is expelled from school for at least one year for a firearm, explosive, or flammable material violation to meet with the local superintendent to determine if the exclusion should be modified.[302]

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[289] 2001 Cal. Legis. Serv. 116 (West).

[290] 2001 Ill. Legis. Serv. 92-64 (West).

[291] 2001 Kan. Sess. Laws H.B. 2336.

[292] 2001 La. Sess. Law Serv. 230 (West).

[293] 2001 La. Sess. Law Serv. 313 (West).

[294] 2001 Me. Acts 67.

[295] 2001 Me. Acts 397.

[296] 2001 Minn. Sess. Law Serv. 183 (West).

[297] 2001 Miss. Laws 486.

[298] 2001 Nev. Stat. ch. 289.

[299] 2001 N.C. Adv. Legis. Serv. 173.

[300] 2001 Tex. Sess. Law Serv. 486 (Vernon).

[301] 2001 Utah Laws 146.

One specific policy response that arose in seven states was to address hazing or bullying. Arizona required every public educational institution in the state to adopt, post, and enforce a hazing prevention policy.[303] California directed its state department of education to develop model policies on prevention of bullying and on conflict resolution and to make them available to school boards.[304] Colorado added a requirement for a policy against bullying to existing requirements for policies on student searches and dress codes.[305] Illinois required school boards, in consultation with parent-teacher advisory committees and other community-based organizations, to address students who have demonstrated behaviors that put them at risk for aggressive behavior, including bullying, in their student disciplinary policies;[306] the policies must include procedures for parental notification and early intervention. Louisiana directed boards to address harassment, bullying, and intimidation as part of their required conduct codes.[307] Nevada prohibited harassment and intimidation on public school premises, at a school activity, or on a school bus.[308] West Virginia forbade harassment, intimidation, or bullying and required local boards of education to establish policies against these disruptive behaviors.[309]

Another method adopted for addressing safety concerns is fostering more information exchange. Arkansas required notification to school boards when a juvenile is arrested or adjudicated delinquent for any offense that may affect the safety of the juvenile or others while at school.[310] Connecticut directed the state social service agency and the judicial department to provide schools with the records of students entering or returning to schools from a juvenile detention center.[311] Florida ordered its department of juvenile justice to inform school boards of the presence of adjudicated offenders and prohibited offenders from attending school or riding school buses with their victims or siblings of their victims;[312] an offender or parents of an offender must pay the extra cost of transporting the offender separate from the victim.

Illinois required the child protective services unit which has investigated allegations of physical or sexual abuse to provide a confidential report about the findings to a child's school;[313] the law also calls for purging information from a student's school record. Illinois amended its Domestic Violence Act of 1986 by directing petitioners who seek to have a child covered by a protective order to provide a court with the name and address of the school a child attends.[314] Indiana continued the requirement that a superintendent immediately notify law enforcement authorities if a student possesses a firearm or bomb on school property; however, the requirement to notify the county prosecutor was removed.[315] Indiana also authorized school corporations to release student records to juvenile justice agencies.[316]

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[302] 2001 Utah Laws 82.

[303] 2001 Ariz. Legis. Serv. 230 (West).

[304] 2001 Cal. Legis. Serv. 646 (West).

[305] 2001 Colo. Sess. Laws 154.

[306] 2001 Ill. Legis. Serv. 92-260 (West).

[307] 2001 La. Sess. Law Serv. 230 (West).

[308] 2001 Nev. Stat. ch. 400.

[309] W. VA. CODE § 18-2C-1, *et. seq.*

[310] 2001 Ark. Acts 1268.

[311] 2001 Conn. Acts 01-176 (Reg. Sess.).

[312] 2001 Fla. Sess. Law Serv. 125 (West).

[313] 2001 Ill. Legis. Serv. 92-295 (West).

Louisiana directed juvenile courts to provide principals with copies of predisposition reports for delinquent children age twelve and above throughout the adjudication and disposition stages of the proceedings against the child.[317] Also, Louisiana required local school boards to adopt policies permitting student records to be disclosed to law enforcement officials without the consent of parents or guardians.[318] In the first of three changes, Maine called for schools to report to the commissioner of education when someone has made a bomb threat; the commissioner, in turn, must report the threat to the legislature.[319] Second, Maine also directed the department of corrections to assist the reintegration of students in custody back into school settings, by providing information upon the request of the superintendent.[320] Third, Maine adopted a team approach for the reintegration of students in custody back into the schools, and required the development of a transition plan for juvenile offenders. If a student fails to meet a condition of the transition plan, a local school unit may deny the child enrollment.

To other criminal acts by students, for which law enforcement had a duty to report to school officials, Minnesota added possession of drug paraphernalia.[321] Minnesota placed a duty on school officials to convene a meeting with parents to determine a student's need for assessment or other services when the child has been removed from school for ten days cumulatively.[322] North Dakota permitted the division of juvenile services to disclose all or part of a juvenile's files and records to school boards as long as the information is reasonably necessary in the best interest of the juvenile and for the protection of others.[323] South Dakota required that notice be given to the chief administrative officer of the school in which a student is enrolled if he or she is adjudicated or convicted of committing, attempting to commit, or conspiring to commit: murder, manslaughter, rape, aggravated assault, riot, robbery, burglary in the first or second degree, arson, kidnapping, felony sexual contact, and other felony offenses.[324]

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[314] 2001 Ill. Legis. Serv. 92-90 (West).

[315] 2001 Ind. Acts 376.

[316] 2001 Ind. Acts 204.

[317] 2001 La. Sess. Law Serv. 461 (West).

[318] 2001 La. Sess. Law Serv. 134 (West).

[319] 2001 Me. Acts 67.

[320] 2001 Me. Acts 452.

[321] 2001 Minn. Sess. Law Serv. 18 (West).

[322] 2001 Minn. Sess. Law Serv. 183 (West).

[323] 2001 N.D. Laws S.B. 2105.

Information exchange also extended to the development and operation of clearinghouses in four states. Indiana directed its department of education to make models of parent involvement plans available to schools from which they might develop written compacts between the school, teachers, students, and parents, requiring each actor to make a reasonable effort to comply.[325] Louisiana established a youth suicide prevention program to be administered by the state department of education.[326] In addition, Louisiana created a clearinghouse of materials and best practices in suicide prevention instruction.[327] Mississippi named a previously created information clearinghouse a School Safety Center and ordered it to provide technical assistance to school boards during crises.[328] Mississippi ordered its state board of education to develop a list of recommended conflict resolution and peer mediation materials, models, and curricula that addresses responsible decision making, the causes and effects of school violence and harassment, cultural diversity, and nonviolent methods for resolving conflict (including peer mediation), and to make the list available to school administrators statewide.[329] Texas established the Texas School Safety Center as a central location for research, training, and technical assistance related to youth safety.[330] This Center is charged with conducting safety training programs, developing a summit on school safety, developing model safety and security audit procedures, providing on-site assistance, developing an information website, and creating a model interagency agreement to address the issue of youth at risk of committing violent acts.

Four states adopted or amended legislation on criminal background checks. Indiana allowed school corporations, nonpublic schools, and special education cooperatives to obtain without charge a limited criminal history of prospective employees.[331] Kentucky amended its criminal records checks requirements to make them no longer applicable to students enrolled in educational institutions and who participate in observations and educational activities under the direct supervision of local school teachers or administrators.[332] Louisiana directed its state bureau of investigation to provide criminal history records going back at least ten years on the request of the state department of education or local school boards.[333] North Carolina called for criminal history records checks for school employees.[334]

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[324] 2001 S.D. Laws H.B. 1004.

[325] 2001 Ind. Acts 505.

[326] 2001 La. Sess. Law Serv. 729 (West).

[327] 2001 La. Sess. Law Serv. 681 (West).

[328] 2001 Miss. Laws 486.

[329] 2001 Miss. Laws 391.

[330] 2001 Tex. Sess. Law Serv. 923 (Vernon).

[331] 2001 Ind. Acts 445.

[332] 2001 Ky. Rev. Stat. & R. Serv. 60 (Baldwin).

[333] 2001 La. Sess. Law Serv. 314 (West).

[334] 2001 N.C. Adv. Legis. Serv. 376.

Another method of dealing with safety concerns in schools is to consider health-related legislation. In the prior year, laws in this area focused on the administration of medication to students. A new feature in the 2001 legislation was self-administration of medication. Illinois permitted self-administration by asthma inhalers with written authorization by a physician and written acknowledgment by parents that school liability is limited to instances of willful or wanton conduct.[335] Indiana allowed students with acute or chronic diseases or medical conditions to possess and self-administer emergency medication while on school grounds or at a school activity.[336] Under this law, a school or school board cannot be rendered civilly liable for damages resulting from self-administration of medicine except for gross negligence or willful and wanton conduct on the part of school personnel or officials. Minnesota exempted asthma inhalers from generalized prohibitions against drugs in schools.[337] New Jersey permitted self-administration of asthma inhalers by students.[338] Texas allowed students with asthma to self-administer medication as long as their parents and physicians have approved their doing so.[339]

Two states adopted other medication-related legislation. California authorized pharmacies to furnish epinephrine auto-injectors to school districts or county offices of education; these can be used by trained personnel when needed.[340] Connecticut required each local school board to adopt and implement policies prohibiting school personnel from recommending the use of any psychotropic drug for any child.[341] In this legislation, Connecticut also provided that the refusal of a parent to administer psychotropic drugs shall not constitute grounds for the social services agency to take the child into custody.

Though purporting to acknowledge local school board discretion in formulating dress code policies, California required every school site to allow for outdoor use of sun-protective clothing, including hats, during the school day.[342] Maine waived immunization requirements for students attending school by distance education.[343] Minnesota amended the state health code to permit schools to hold potluck events in areas of the school other than the kitchen.[344] New Hampshire repealed the statutory duties for school nurses of screening for tuberculosis and making a yearly record of age, height, weight, and grade of each pupil, then permitted school nurses to administer oxygen to a pupil in a medical emergency without parental permission or a doctor's order[345] Texas ordered screening for the disease acanthosis nigricans.[346]

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[335] 2001 Ill. Legis. Serv. 92-402 (West).

[336] 2001 Ind. Acts 376.

[337] 2001 Minn. Sess. Law Serv. 84 (West).

[338] N.J. Rev. Stat. § 18A:40-12.3.

[339] 2001 Tex. Sess. Law Serv. 511.

[340] 2001 Cal. Legis. Serv. 458 (West).

[341] 2001 Conn. Acts 01-124 (Reg. Sess.).

[342] 2001 Cal. Legis. Serv. 575 (West).

[343] 2001 Me. Acts 87.

[344] 2001 Minn. Sess. Law Serv. 65 (West).

In order to protect school personnel from claims arising from their attempts to ensure school safety, four states provided immunity. Delaware provided immunity so that teachers who act pursuant to their duties cannot be liable for civil damages unless the conduct at issue shocks the conscience.[347] California limited defamation claims by specifying that communications about threats of school violence between students and school personnel as well as between school personnel on a subject of public concern can be subject to liability only when remarks are made with knowledge of falsity or reckless disregard for truth or falsity.[348] Missouri extended immunity to school employees to include reporting acts or threatened acts of school violence.[349] Nevada extended immunity from civil liability to persons who report a threat of violence against school officials, employees, or pupils.[350]

Other pieces of safety-related legislation passed in 2001 are described as follows. California amended fire protection legislation to require all public, private, and parochial schools with fifty or more students to conduct monthly fire drills in elementary grades and four times per year in intermediate grades.[351] California also revised its existing school safety legislation to require recipients of violence-prevention funds to provide age-appropriate instruction in domestic violence prevention, dating violence prevention, and interpersonal violence prevention.[352]

Florida provided professional liability insurance for full-time school personnel;[353] part-time employees may participate in the program by paying for the insurance at cost. Illinois amended its Violence Prevention Act of 1995 as the Safe to Learn Program in order to fund a school-based safety and violence prevention program with the following components: building security; metal detectors; violence prevention and intervention; and crisis management training for teachers and other personnel.[354]

Indiana included conflict resolution as a component of "good citizenship instruction" and directed its department of education to identify and make models of conflict resolution instruction, including teacher training and classroom techniques, available to school corporations.[355] Louisiana lowered the population for parishes authorized to permit identification badges for students from 130,000 to 120,000.[356] In addition, Louisiana authorized the creation of youth development and assistance programs to facilitate the early identification of and intervention for aggressive, antisocial, and delinquent behaviors.[357] North Carolina required car rental companies to notify vehicle renters of a state law forbidding drivers from passing stopped school buses.[358] Oklahoma permitted career and technology centers to designate smoking areas outside of buildings and out of sight of children for adults attending meetings and training seminars at their facilities.[359]

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[345] 2001 N.H. Laws 83.

[346] 2001 Tex. Sess. Law Serv. 1465 (Vernon).

[347] DEL. CODE ANN. tit. 14, § 701. (2001).

[348] 2001 Cal. Legis. Serv. 570 (West).

[349] 2001 Mo. Legis. Serv. 86 (Vernon).

[350] 2001 Nev. Stat. ch. 524.

[351] 2001 Cal. Legis. Serv. 725 (West).

[352] 2001 Cal. Legis. Serv. 735 (West).

[353] 2001 Fla. Sess. Law Serv. 46 (West).

[354] 2001 Ill. Legis. Serv. 92-409 (West).

[355] 2001 Ind. Acts. 1971.

Students with Disabilities

Six state legislatures passed bills concerned with delivering services to students with disabilities. Arizona provided for the transfer of rights accorded parents of pupils with disabilities under Part B of the IDEA (20 U.S.C. 1400-1420) to pupils at age eighteen unless an individual is declared legally incompetent.[360] Moreover, Arizona amended provisions related to special education to require homeschools and private schools to be treated the same with respect to the delivery of special education services.[361]

Illinois added to the list of services provided by school social workers to include assisting in the completion of functional behavior assessments and the development of non-aversive behavior intervention strategies.[362] Kentucky amended its definition of "change in placement" for suspended special education students;[363] while a change in placement was previously ten days total, it is now ten consecutive days or when it constitutes a pattern of removal that accumulates to more than ten days per year. Mississippi required individuals providing observations for the purpose of making recommendations on a student's IEP to make a report directly to the child's school board.[364] Mississippi also directed its state board of education to develop and issue criteria for an occupational diploma for students with disabilities and give them the opportunity to qualify for an occupational diploma beginning with the 2002-2003 school year.[365]

New York called for the availability of textbooks in alternative formats for use by students with disabilities.[366] Texas prohibited students with disabilities from being confined to a locked box, closet, or other especially designed locked space as either a discipline management practice or a behavior management technique;[367] the law also requires the commissioner to issue rules on use of restraints and time-out. Further, Texas amended its state special education law on placement to require manifestation determinations, functional behavior assessments, and behavior intervention plans for students with disabilities who exhibit disciplinary problems.[368]

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[356] 2001 La. Sess. Law Serv. 483 (West).

[357] 2001 La. Sess. Law Serv. 786 (West).

[358] 2001 N.C. Adv. Legis. Serv. 331.

[359] 2001 Okla. Sess. Law Serv. 188 (West).

[360] 2001 Ariz. Legis. Serv. 47 (West).

[361] 2001 Ariz. Legis. Serv. 364 (West).

[362] 2001 Ill. Legis. Serv. 92-362 (West).

[363] 2001 Ky. Rev. Stat. & R. Serv. 95 (Baldwin).

[364] 2001 Miss. Laws 554.

[365] 2001 Miss. Laws 605.

[366] 2001 N.Y. Laws 377.

Technology

Efforts at increasing the use of technology in schools continued as thirteen states adopted technology-related legislation. Arkansas ordered the establishment of Internet use policies for public schools and libraries.[369] Colorado funded a grant program, the Colorado Information Technology Education Act, to provide funds for technology programs for grades nine through twelve.[370] Georgia required publishers of textbooks recommended by its state board of education to make textbooks available in an electronic format.[371] Idaho added virtual or digital delivery of instruction to the optional means of delivery of instruction for public charter schools.[372]

Louisiana created the office of information technology to oversee all instructional technology applications.[373] Kansas established a broadband technology-based network called KAN-ED to which schools, libraries, and hospitals may connect for Internet access and distance learning.[374] Maine directed its commissioner of education to adopt rules and to define the function of educational technicians;[375] the regulations must recognize work experience credits earned by educational technicians through apprenticeship programs offered by its department of labor.

Montana allowed local school trustees to establish a technology acquisition and depreciation fund for the purchase, rental, repair, maintenance, and depreciation of technological equipment, and technology training for school personnel.[376] Nevada authorized the use of distance learning, set up guidelines for enrollment in such programs, and required boards of trustees to give permission for students to participate in distance education from another school district.[377] North Dakota ordered its information technology department to prepare an annual report identifying all major projects, financing arrangements, comparison of service rates between the public and private sector, and any benefits the state received as a result of the investment in information technology.[378] Oklahoma permitted participation in Internet-based courses as a means of meeting compulsory attendance requirements.[379] South Dakota provided additional compensation for courses taught over the Digital Dakota Network.[380]

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[367] 2001 Tex. Sess. Law Serv. 212 (Vernon).

[368] 2001 Tex. Sess. Law Serv. 1225, 767 (Vernon).

[369] 2001 Ark. Acts 624.

[370] 2001 Colo. Sess. Laws 240.

[371] 2001 Ga. Laws H.B. 228, No. 1.

[372] 2001 Idaho Sess. Laws H.B. 317a.

[373] 2001 La. Sess. Law Serv. 772 (West).

[374] 2001 Kan. Sess. Laws H.B. 2035.

[375] 2001 Me. Acts 98.

[376] 2001 Mont. Laws 474, 495.

[377] 2001 Nev. Stat. ch. 599.

Texas directed its commissioner of education to implement a distance education program using electronic courses.[381] Texas also established a master technology certificate program, providing an incentive stipend of $5,000 for teachers receiving the certificate.[382] Utah created reporting requirements for local libraries and school boards to prevent a minor's access to obscene material on their Internet services.[383] Utah established the Distance Education Doctorate Program focusing on curriculum and instruction to be offered through Utah State University over the UEH-EDNET telecommunications system.[384] Virginia required division superintendents to select technology for filtering out child pornography and obscenity defined by state law.[385]

Training Programs

Six states provided for staff development by statute in 2001. California established teacher professional development programs in mathematics and reading as well as for teaching the "value and utility of the diagnostic nature of standardized tests."[386] Idaho amended a provision requiring twenty-two hours of staff development to specify that it might occur before the first and after the last day of school.[387] Illinois encouraged school personnel to acquire, develop, and maintain the knowledge and skills necessary to properly administer life-saving techniques.[388] Illinois also provided professional development in its amendments to the Early Childhood Reading Improvement Block Grant program.[389]

Kentucky put priority on mathematics content knowledge in using the Teachers' Professional Growth Fund but permitted the department of education to approve using the funds for development in other content areas if all of the funds are not needed for professional development for middle school mathematics teachers.[390] Maine directed its commissioner of education, in rules related to administration of medicine in schools, to describe how its department of education will provide training at the local level to unlicensed personnel in each administrative unit or private school.[391] Nevada created a statewide council for regional coordination for professional development of teachers and administrators.[392]

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[378] 2001 N.D. Laws SB 2043.

[379] 2001 Okla. Sess. Law Serv. 427 (West).

[380] 2001 S.D. Laws H.B. 1291.

[381] 2001 Tex. Sess. Law Serv. 944 (Vernon).

[382] 2001 Tex. Sess. Law Serv. 1301 (Vernon).

[383] 2001 Utah Laws 172.

[384] 2001 Utah Laws 32.

[385] 2001 Va. Acts 269.

[386] 2001 Cal. Legis. Serv. 737 (West).

[387] 2001 Idaho Sess. Laws S.B. 1133.

[388] 2001 Ill. Legis. Serv. 92-23 (West).

[389] 2001 Ill. Legis. Serv. 92-25 (West).

[390] 2001 Ky. Rev. Stat. & R. Serv. 135 (Baldwin).

Transportation

Three states adopted legislation related to transportation. Indiana permitted preschools to contract with common carriers for incidental charter bus service for non-regular transportation.[393] Michigan exempted buses leased seasonally to transport agricultural workers from the standard school bus color scheme.[394] Minnesota now requires each school board, nonpublic school, or private contractor to verify the validity of the driver's license for each person who transports students on an annual basis.[395]

Higher Education

The 2001 legislative year saw a continued increase in the volume of legislation related to higher education. An emerging feature was accountability provisions, similar to those overrunning K-12 education. Legislatures also demanded stronger articulation between universities and other educational institutions. Historically, legislatures have been content with establishing governance structures for higher education and funding targeted programs. Now, it appears that legislatures want to get more involved with the internal management of postsecondary institutions.

Five states adopted accountability provisions of one type or another. Arizona created an oversight committee drawn from the executive and legislative branches and charged it with developing and adopting guidelines for a performance-based accountability system for state universities and departments of state government.[396] Arkansas required sophomore college students to take a test to evaluate learning in the state general education curriculum.[397] Colorado exempted the Colorado School of Mines from the Higher Education Quality Assurance Act, art. 13, Tit. 23, C.R.S.[398] However, Colorado enacted a student bill of rights for public institutions of higher education; under this law, associate's degrees must be completed within two years with 60 credit hours and bachelor's degrees must be completed within four years with 120 credit hours. Students must receive a plan of study and information regarding which courses are required and which courses are transferable; core courses must be transferable statewide and may not expire for ten years from the date of initial enrollment.[399] Kansas called for the development of quality performance indicators for postsecondary institutions.[400] Texas exempted higher education students with high grade point averages in high school college preparation courses from taking the TASP college-level competency test.[401]

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[391] 2001 Me. Acts 451.

[392] 2001 Nev. Stat. ch. 13 (Special).

[393] 2001 Ind. Acts 501.

[394] 2001 Mich. Pub. Acts 130.

[395] 2001 Minn. Sess. Law Serv. 98 (West).

[396] 2001 Ariz. Legis. Serv. 247 (West).

[397] 2001 Ark. Acts 1085.

[398] 2001 Colo. Sess. Laws 320.

Three states demanded stronger articulation between educational entities. Colorado required statewide articulation of course numbers for general education classes in all public institutions of higher education in order to assure quality of general education courses and to permit them to be comparable and transferable statewide.[402] Kentucky directed the council on postsecondary education to administer a competitive grant program to enable the establishment of local P-16 councils charged with promoting the preparation and development of teachers, aligning of competitive standards, and eliminating barriers that might impede student transition from preschool through baccalaureate programs.[403] Texas permitted the creation of a partnership between the University of Texas-Pan Am and South Texas Community College District to allow the latter to offer lower division courses required at the university with automatic transfer of credit to the university.[404] Texas also allowed the existence of joint credit programs involving institutions of higher education and private high schools, including homeschools.[405]

Six states addressed employment issues in higher education. California made reappointment rights of temporary or part-time faculty a mandatory topic of collective bargaining in community college districts.[406] Further, California required the chancellor of its community college system to address teacher shortages by creating a model curriculum for teacher preparation.[407] Iowa directed the department of education to establish a task force to study the licensing of community college faculty.[408] Louisiana authorized postsecondary management boards to enter into deferred salary agreements with employees when employees participate in it voluntarily.[409] Maine prohibited universities, technical colleges, and its maritime academy from accepting donations that would carry restrictions that would limit or interfere with academic freedoms typically accorded to faculty.[410] Texas required university faculty members to receive a written employment contract not later than thirty days before the first day of the academic year.[411] Washington stipulated that, in community and technical colleges, an individual who is tenured or has tenure track status is considered to have a reasonable assurance of reemployment unless advised otherwise by college officials.[412] Washington also required its college board to create an electronic job bank on its website to act as a clearinghouse for persons seeking academic teaching positions at technical and community colleges.[413]

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[399] 2001 Colo. Sess. Laws 329.

[400] 2001 Kan. Sess. Laws S.B. 10.

[401] 2001 Tex. Sess. Law Serv. 1072 (Vernon).

[402] 2001 Colo. Sess. Laws 279.

[403] 2001 Ky. Rev. Stat. & R. Serv. 76 (Baldwin).

[404] 2001 Tex. Sess. Law Serv. 33 (Vernon).

[405] 2001 Tex. Sess. Law Serv. 908 (Vernon).

[406] 2001 Cal. Legis. Serv. 850 (West).

[407] 2001 Cal. Legis. Serv. 714 (West).

[408] 2001 Iowa Legis. Serv. 154 (West).

[409] 2001 La. Sess. Law Serv. 145 (West).

[410] 2001 Me. Acts 86.

Bacterial meningitis was also a topic of legislation. Connecticut required all public and private colleges and universities to mandate the vaccination against meningitis for all students living in student housing.[414] Illinois directed universities to provide incoming first-year and transfer students with information about meningitis and its transmission, and to offer vaccines when they maintain a health service.[415] Michigan ordered its department of public health to identify and make available information materials about meningococcal disease and the risk and benefits of immunization against the disease, to each institution of higher education.[416] Texas ordered the Texas Higher Education Coordinating Board to establish procedures by which each institution of higher education must provide information about bacterial meningitis to all new students.[417]

Four states passed legislation about tuition. California exempted alien students who attended three or more years of high school there from paying tuition in state institutions of higher education.[418] Illinois required boards of trustees to report tuition and fee waivers granted each year to the board of higher education and to the General Assembly.[419] Louisiana permitted governing boards for colleges and universities to establish proportional tuition and fee amounts for part-time, summer school, and intersession students.[420] Texas authorized the University of Texas at Austin to participate in a flat-rate tuition project which permits charging the same tuition rate to all undergraduates at the cost of fourteen semester hours per term.[421] Other higher education-related legislation is listed below to complete this section.

Arizona added exemptions in its Freedom of Information Act concerning information related to university records so that the following are protected from disclosure: intellectual property in unfunded grant proposals, propriety data and research material, donated historical records when privacy is a condition of donation, and records regarding donors other than name and amount of donation.[422] California amended the duties of the postsecondary education commission to require it to engage in periodic study of the percentage of in-state public high school graduates estimated to be eligible for admission to the University of California and California State University systems.[423] In addition, California delayed implementation of a prior bill requiring trustees of California State University to adopt an alternative procedure for adoption of regulations, other than the Administrative Procedures Act.[424]

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[411] 2001 Tex. Sess. Law Serv. 1298 (Vernon).
[412] 2001 Wash. Legis. Serv. 99 (West).
[413] 2001 Wash. Legis. Serv. 110 (West).
[414] 2001 Conn. Acts 01-93 (Reg. Sess.).
[415] 2001 Ill. Legis. Serv. 92-89 (West).
[416] 2001 Mich. Pub. Acts 163.
[417] 2001 Tex. Sess. Law Serv. 219 (Vernon).
[418] 2001 Cal. Legis. Serv. 814 (West).
[419] 2001 Ill. Legis. Serv. 92-51 (West).
[420] 2001 La. Sess. Law Serv. 955 (West).
[421] 2001 Tex. Sess. Law Serv. 579 (Vernon).

Florida created a public corporate authority, the Higher Education Facility Financing Authority, and directed it to issue negotiable notes and revenue bonds for capital development of private not-for-profit institutions of higher education.[425] Iowa ordered its state board of regents to submit an annual status report on affirmative action accomplishments and accomplishments regarding diversity and multiculturalism.[426] Iowa also required colleges and universities to report campus crime statistics and adopted sexual abuse policies.[427] Kentucky defined and prohibited racial profiling, making it applicable to schools and universities with police and classifying it as a civil rights violation.[428]

Michigan authorized its secretary of state to develop a University of Michigan license plate.[429] New Mexico established at the New Mexico Institute for Mining and Technology an institute for complex additive systems analysis, to integrate components of computer science, engineering, and management departments.[430] In addition, New Mexico required staff architects at universities to review all plans for construction or enlargement of facilities, to ensure the existence of adequate parking.[431] Montana requested an interim study of laws governing community colleges.[432] Texas ordered the Texas Higher Education Coordinating Board to conduct a best practices study of women's athletic development programs, and to report its findings to the legislature.[433]

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[422] 2001 Ariz. Legis. Serv. 216 (West).

[423] 2001 Cal. Legis. Serv. 571 (West).

[424] 2001 Cal. Legis. Serv. 717 (West).

[425] 2001 Fla. Sess. Law Serv. 79 (West).

[426] 2001 Iowa Legis. Serv. 149 (West).

[427] 2001 Iowa Legis. Serv. 39 (West).

[428] 2001 Ky. Rev. Stat. & R. Serv. 158 (Baldwin).

[429] 2001 Mich. Pub. Acts 124.

[430] 2001 N.M. Laws 39.

[431] 2001 N.M. Laws 319.

[432] 2001 Mont. Laws 377.

[433] 2001 Tex. Sess. Law Serv. 1513 (Vernon).

Conclusion

Legislative activity in 2001 increased approximately 10 percent above its level in 2000. Although fewer bills were passed at the federal level, the No Child Left Behind Act of 2001 is a massive policy initiative which threatens to alter the relationship between the federal government and the states with regard to the direction of schooling. Within the states, concerns about school safety and accountability continued to dominate the thoughts of legislators. It is curious and perhaps very telling that school safety legislation leaned heavily toward making more acts criminal and adopting stricter school policies rather than toward educating students appropriately and training school employees to deal more effectively with violence.

Accountability legislation in 2001 continued to find few carrots and an abundance of sticks. Although a few states adopted broader-based reform measures, including targeting resources where they are most needed, and a few states seem to be withdrawing from the heavy emphasis on testing, the accountability and school reform movement seems to suffer from a dearth of good ideas based on learning theory and motivation theory. In 1998 and 1999, sixteen and thirty-nine, respectively, legislative acts were passed that created specialized training programs for teachers or administrators, provided incentives for teachers who received advanced training, or directed the creation of new staff development programs. Only four such acts passed in 2000. The 2001 legislative year fared no better on that score.

In an era of high-stakes, standards-based testing, it seems appropriate that the curriculum would become more focused. However, legislatures continue to add curriculum requirements—a bird day here, a day honoring an historical figure there, a week for a favored topic over there—and the curriculum soon becomes scattershot with diversions and deflections.

The exercise of locating the hundreds of bills related to education each year produces two alternative viewpoints. One can marvel at how the fifty state legislatures are individual laboratories for educational governance, a well-spring of new ideas. On the other hand, one cannot help but be concerned that so many of the ideas are punitive, authoritarian, and misapprehending of leadership.

10

EDUCATION-RELATED CASES

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Introduction

This chapter summarizes key education-related cases from the Supreme Court that do not typically arise in school settings but may have implications for educators and their legal counsel. This chapter is best read as a supplement and early warning about cases that are relevant or may become so in educational settings. Other subject matter chapters in *The Yearbook of Education Law* deal with some of the topics raised in this section that clearly arise in educational settings.

IDEA-Related

The Supreme Court addressed a dispute involving the Kansas Sexually Violent Predator Act (KSVPA),[1] that should be of interest to educators for two reasons. First, *Kansas v. Crane*,[2] concerning sexually violent individuals, touches on safety matters relating to children in school settings. Second, *Crane* illuminates the Court's perspective when dealing with sanctions based on an analysis of whether individuals are capable of controlling their behavior. There are some parallels to efforts in school settings to evaluate whether behavior subject to discipline, perpetrated by students who may have disabilities or behavioral disorders, is controllable and thus sanctionable, or whether that behavior is a manifestation of a disability that exposes it to a different set of rules.

The KSVPA, enacted in 1994, provides for the civil commitment of sexually violent predators who exhibit a mental abnormality or personality disorder. Previously, in *Kansas v. Hendricks*,[3] the Supreme Court upheld the conviction of a pedophile who was placed in state custody after being convicted of taking indecent liberties with a child. In *Hendricks* the defendant unsuccessfully claimed that since he should not have been remanded to state custody without a separate criminal proceeding, he was subjected to double jeopardy.

In *Crane,* the Court considered the application of the KSVPA to an attempted rapist whom the State's psychiatric witness described as suffering from exhibitionism and an antisocial personality disorder. Although convicted and committed, the Supreme Court of Kansas ordered the defendant to be set free on the ground that, even following *Hendricks,* it was necessary to determine whether such an individual could control his dangerous behavior.[4]

On further review in *Crane*, the Supreme Court vacated and remanded in ruling that in order to apply the KSVPA to commit a person, it was unnecessary to decide whether an individual absolutely could control his or her dangerous behavior. Yet, the Court did hold that there had to be some consideration over an individual's ability to control his or her behavior: "[W]e recognize that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior.'"[5] The issue in this relatively problematic case was to consider what level of lack of control is required before a civil commitment can be imposed without violating a defendant's constitutional rights. The court noted:

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[1] Kan. Stat. Ann. §§ 59-29a01 *et seq.*

[2] 122 S. Ct. 867 (2002).

[3] 521 U.S. 346 (1997).

[4] *In re* Crane, 7 P.3d 285 (Kan. 2000).

> *Hendricks* referred to the Kansas Act as requiring a "mental abnormality" or "personality disorder" that makes it "difficult, if not impossible, for the [dangerous] person to control his dangerous behavior." The word "difficult" indicates that the lack of control to which this Court referred was not absolute. Indeed, as different amici on opposite sides of this case agree, an absolutist approach is unworkable.[6]

The Court specified that before an individual can be committed, there must be an adjudication over his or her capacity to control the behavior but the appropriate standard need not be that it cannot be controlled. This is an interesting twist because earlier, in *Hendricks*, the defendant admitted his inability to control his urge to molest children. Yet, the Court held that a declaration of inability to control behavior is not the standard required before commitment under the KSVPA and that difficulty controlling behavior may be enough to lead to incarceration. At the same time, the Court disagreed with the notion that the Constitution permits commitment of dangerous sexual offenders without any consideration of their lack-of-control.

The Court did seem troubled that the civil commitment statute could become a proxy for a criminal prosecution utilizing less stringent standards of proof and due process. This may explain the Court's imposing a requirement of some type of finding regarding lack of control. The Court added that dangerous sexual offenders needed to be distinguished from other civil commitments of other offenders. It seems that the Court recognized the unique dangers that sex offenders, such as pedophiles, present as distinguished from other classes of dangerous persons. Further, *Crane* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment from other dangerous persons who are perhaps more properly dealt with through criminal proceedings. Such a distinction is necessary lest civil commitment become a mechanism for retribution or general deterrence, a function properly belonging to criminal, not civil, law.

Child advocates may feel free to seek legislative safeguards patterned after the KSVPA to protect children and other victims of sexual offenders. Should advocates seek to adopt an approach similar to the KSVPA, *Crane* makes evident that applying such statutes must include at least some finding over an offender's lack of ability or difficulty in controlling dangerous behavior. Even so, after *Crane*, no bright-line finding of total inability to control behavior is required.

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[5] Crane, *supra* note 2, at 870.

[6] *Id.* at 870 (internal citations omitted).

While it might be said that *Crane* provides more heat than light to guide such deliberations, educators would do well to consider the principles discussed in it in dealing with manifestation determinations. At the very least, *Crane* seems to indicate that it is appropriate to treat differently those who may be prone to sexual offenses in fashioning remedies and discipline that is intended to safeguard others from dangerous sex offenders.

First Amendment

Two years ago, in *Hill v. Colorado*,[7] the Supreme Court, in a challenge from pro-life advocates, upheld a statute that prohibited any person from knowingly approaching within eight feet of another individual near a health care facility without the latter's consent. The statute was enacted in response to pro-life advocates' practice of approaching women who may have been seeking abortions at clinics in an effort to dissuade them from doing so. The Court affirmed that the statute was neither unconstitutionally overbroad nor a prior restraint on speech but a constitutionally permissible, narrowly-tailored, time, manner, and place restriction on speech.

This year, in *Thomas v. Chicago Park District*,[8] the Court again considered the viability of a time, manner, and place regulation of speech. In *Thomas*, advocates seeking the legalization of marijuana challenged an ordinance adopted by the Chicago Park District that applied to all who wished to "conduct a public assembly, parade, picnic, or other event involving more than fifty individuals" or engage in an activity such as "creat[ing] or emit[ting] any Amplified Sound."[9] The ordinance allows the park district to deny a permit based on any of thirteen specific grounds such as failing to submit an application fee; constituting an unreasonable danger to the health or safety of the applicant or other users of the park or the public in general; and having lied on, or having failed to comply with, park regulations in a previous application.[10]

Having been denied an application to conduct a pro-marijuana rally, the group claimed that the ordinance was a facially invalid, unconstitutional prior restraint on speech in violation of the First Amendment. A unanimous Supreme Court affirmed that the thirteen specific grounds were reasonable time, manner, and place regulations on speech. Moreover, the Court rejected the petitioners' charge that language in the ordinance which read that the park district "may," rather than "must," deny an application was subject to too much content-based discretion that might have allowed overlooking inadequacies for favored speakers and groups. In doing so, the Court seemed to believe that rigid application of the specific requirements in mandatory rather than permissive language would have restricted free speech unnecessarily.

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[7] 530 U.S. 703 (2000).

[8] 122 S. Ct. 775 (2002).

[9] *Id.* at 777.

[10] Chicago Park Dist.Code, ch. VII, § C.5.e.

Thomas outlines elements of a code that could be considered as schools refine the grounds on which they provide access to their buildings after school for rallies or other activities. These codes can outline the grounds under which an institution may deny access to a facility without having to be bound to a mandatory standard under which they must reject applications. Even so, restrictive requirements must be enforced in such a way that no pattern occurs in granting or denying applications that favor one type of speech, speaker, or content.

The Supreme Court removed control over tobacco and its advertising from the Food and Drug Administration in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*[11] on the basis that its enabling legislation lacked jurisdictional authority. In so doing, the Court invalidated regulations that were intended to protect children by prohibiting outdoor advertising of tobacco products within 1,000 feet of any public playground or school. Subsequently, manufacturers and sellers of cigarettes and smokeless tobacco products challenged a state regulation in Massachusetts that sought to protect children by limiting advertising of tobacco products within 1,000 feet of a school or playground and required tobacco advertisements in stores to be placed no lower than five feet from the floor.

In *Lorillard Tobacco Company v. Reilly*,[12] a fractured Court, in a case in which no one justice joined each part of the opinion, the Court invalidated Massachusetts' regulations as violative of the First Amendment. Yet, the Court upheld the related regulation which required tobacco products to be placed behind counters. Even though the Court's rationale may not be particularly instructive for educators and their counsel, the importance of this case is that it makes clear that regulations designed to keep children from using tobacco while still minors, the time at which research reveals the majority of smokers adopt the habit, are no longer available. In fact, states are unable to establish such regulations because the Court observed that such limitations were preempted by the Federal Cigarette Labeling and Advertising Act.[13]

Following *Lorillard*, there may be an increase in tobacco use by minors. At the very least, the aggressiveness of tobacco manufacturers, including suing (unsuccessfully here) to invalidate even a regulation that tobacco products must be kept behind counters and only available to adults, portends a bleak future regarding their plans to advertise to children. Insofar as state regulation is unavailable to protect children from tobacco, the only solution for advocates is to seek federal legislation, provided the Court allows it under the First Amendment.

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[11] 529 U.S. 120 (2000).

[12] 121 S. Ct. 2404 (2001).

[13] 15 U.S.C. §§ 1333, 1334 (b).

In *Bartnicki v. Vopper,*[14] ostensibly involving the First Amendment but also concerning privacy in outlining the protections of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[15] the Court dealt with an illegally taped cellular phone conversation. In the midst of contentious collective bargaining negotiations between a teachers' union and a school board in Pennsylvania, the union's chief negotiator and its president had a lengthy cell phone conversation about their meetings with the board's negotiating team. The conversation included references to the potential need for a strike and inflammatory language about ways to move the school board to meet the union's demands: "'If they're not gonna move for three percent, we're gonna have to go to their, their homes ... To blow off their front porches, we'll have to do some work on some of those guys."[16] An unknown third party illegally intercepted the transmission and gave it to a radio commentator who broadcast the conversation.

The Court reasoned that the Omnibus Act was constitutional as a content-neutral law of general applicability designed to punish the further publication of any illegally obtained wiretap information by any party. The central issue was whether a newspaper, radio station, or other party which receives information legally may be punished under this or any other statute due to the illegal acts of a third party. The Court, focusing on the First Amendment's purposes and the information's being on a matter of public concern, was of the opinion that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern ..." since "one of the costs associated with participation in public affairs is a loss of privacy."[17] The Court pointed out that in *New York Times Company v. Sullivan,*[18] when dealing with a matter of public concern, a newspaper was protected under the First Amendment even when it committed a factual error or included defamatory content. The Court highlighted the importance of a matter of public concern in maintaining that parallel analysis required it to conclude that a stranger's illegal conduct does not remove the First Amendment shield from speech about such subjects. Thus, the radio station and commentator were not liable for broadcasting the tape.

In light of *Bartnicki*, educators should be aware that they will have little recourse to halt or punish the release of information on a matter of public concern, even if it is obtained illegally. Insofar as much of what is done in public education, especially during a work action, may be classified as a public concern, educators need to be wary of how they communicate with each other. The Court considered another important First Amendment issue in *Ashcroft v. Free Speech Coalition,*[19] a dispute over the constitutionality of the Child Pornography Prevention Act of 1996 (CPPA).[20] The CPPA made all depictions that "appear to be" or "convey the impression" of being child pornography illegal even if no child was actually used or harmed in their production. The Ninth Circuit contended that the portions of the statute that outlawed the appearance or impression of child pornography were unconstitutionally vague and prohibited speech that was protected by the First Amendment.[21] The Ninth Circuit further discerned that the state could not justify criminal prosecution when no actual children were involved in depictions. However, since the panel thought that some portions of the statute were severable, other protections remained in effect. In affirming, the Supreme Court was of the view that the CPPA, by criminalizing the appearance or impression of child pornography, prohibited too broadly protected areas of speech. As such, the Court rejected the state's interest in protecting children due to the overbroad burden that the CPPA placed on protected speech.

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[14] 121 S. Ct. 1753 (2001).

[15] 18 U.S.C. § 2511 (1)(a).

[16] Vopper, *supra* note 14, at 1757.

[17] *Id.* at 1766.

[18] 376 U.S. 254 (1964).

[19] 122 S. Ct. 1389 (2002).

Educational agencies and state licensing boards that certify teachers seem to think that they are justified in treating educators/employees who access what may appear to be child pornography differently—more severely—than those who access other obscene or pornographic images of adults. If, and when this is done, it is based on the real world experience of educators, law enforcement, and child protection officers as well as others who deal with the potential risk to children posed by adult pedophiles who may have access to students in schools.

Search and Seizure

Search and seizure issues require continual attention in school settings and in a democratic society in general. This year the Court added to its recent jurisprudence by outlining additional guidelines in four separate cases.

United States v. Arvizu[22] addressed the circumstances under which a law enforcement agent can conduct an investigatory stop based on a quantum of suspicion less than probable cause. *Arvizu* is especially relevant since it provides more analysis to help define the contours of reasonable suspicion searches, the standard that the Court first applied to schools in *New Jersey v. T.L.O.*[23]

Arvizu was observed driving on an unpaved road in a remote area of southeastern Arizona, a location known as an important corridor for drug importing and smuggling by illegal aliens. Arvizu was driving a minivan on a primitive road, situated at the crossroads of two other regularly traveled unpaved roads that smugglers tended to take to avoid what they had come to know as a checkpoint of the Border Patrol. Evidently, the Border Patrol discovered that generally only Forest Service personnel or those engaged in ranching activities used the more primitive road for lawful activities, thus roving border patrols were established. An agent stopped Arvizu based on several fact-specific factors such as his trip's apparently having been timed to correspond to the normal shift change of the agents, his slowing down when seeing the agent, his failure to acknowledge the agent by waving as he passed, the raised position of his children's knees, and what the agent described as their odd, stiff waving. When stopped, the agent discovered 100 pounds of marijuana in Arvizu's car.

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[20] 18 U.S.C.A. § 2256(8)(B).

[21] Free Speech Coalition v. Reno 198 F.3d 1083, 1089 (9th Cir. 1999).

[22] 122 S. Ct. 744 (2002).

[23] 469 U.S. 325 [21 Educ. L. Rep. 1122] (1985).

The Ninth Circuit rejected the fact-specific factors as an insufficient basis to render the stop permissible under the Fourth Amendment. If anything, the court suggested that the "[f]act-specific weighing of circumstances or other multifactor tests introduced 'a troubling degree of uncertainty and unpredictability' into the Fourth Amendment analysis."[24] On further review, the Supreme Court reversed in recognizing that reasonable suspicion as cause sufficient to authorize a police stop is an elusive concept more abstract than a finely tuned standard.

In enunciating a relatively vague standard, the Court ruled that the Ninth Circuit's rejection of the identified factors in isolation from each other did not take into account the totality of the circumstances. The Court was convinced that each of the agent's observations, that by themselves might have been susceptible to innocent explanations, resulted in a situation where their sum exceeded the whole of their parts. Further, the Court harked back to the seminal *Terry v. Ohio*[25] wherein it established the notion of reasonable suspicion. Under a so-called "*Terry* Stop," activities that individually seem innocent, such as repeatedly walking back and forth and looking into a store window and conferring with companions, taken as a totality of the circumstances can establish reasonable suspicion for a brief investigatory stop. The Court, in pointedly criticizing the Ninth Circuit, determined that the relatively flexible, vague standard of "totality of the circumstances" was the only reasonable approach in such stops:

> [T]he Court of Appeals' approach would … seriously undercut the "totality of the circumstances" principle which governs the existence of … "reasonable suspicion." Take, for example, the court's positions that respondent's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge [the agent's] presence provided no support because there were "no 'special circumstances rendering innocent avoidance . . . improbable.'" We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer

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[24] United States v. Arvizu, 232 F.3d 1241, 1248 (9th Cir. 2000).

[25] 392 U.S. 1 (1968).

> might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona).[26]

The Court underscored the earlier standards outlined in *Terry* and other cases that allow law enforcement officials to make assessments based on a totality of the circumstances and their "specialized training and familiarity with the customs of the area's inhabitants."[27] Yet, the agent's testimony seems slightly problematic since his demonstration of the way the children waved at him and his comment that their behavior struck him as though they were instructed to do so to avoid suspicion goes to the heart of totality of the circumstances analysis in reasonable suspicion cases. The Court posited that such analyses are best left to agents in the field and trial courts, rather than appellate panels which apply what it termed a "divide and conquer" approach in examining each individual factor that a law enforcement official testifies to at trial or relied on in making a reasonable suspicion stop. The Court was satisfied that factors that may separately appear to be susceptible to an innocent explanation, when combined with other items, may be sufficient to establish an objective basis for a vehicle stop based on reasonable suspicion.

Educators utilizing *T.L.O.*'s reasonable suspicion standard to initiate searches can gain comfort from *Arvizu* when they use the totality of the circumstances to justify searches. To this end, it is important to keep in mind that reasonable suspicion can be formed as a part of a set of circumstances from such seemingly innocent factors as the way a student returns a wave or recognizes the presence of an administrator or teacher. Even so, the totality of the circumstances should still be considered when taking separate factors into account in summing up to reasonable suspicion based on an educator's training and familiarity with what is taking place in a school setting.

In *United States v. Knights*,[28] an arson defendant who was a former felon sought to suppress evidence of his possession of an unregistered, destructive device and ammunition that was acquired during a warrantless search of his apartment. The case arose after the last of thirty arson and other attacks on Pacific Gas and Electric (PG&E) installations that occurred three days subsequent to the defendant's being placed on probation, and following company officials' having filed a theft of service complaint against him, the attacks coincided with his court appearance date. In addition, one week before the last arson attack, the defendant was stopped near a PG&E gas pipeline with gasoline and pipes in the back of his pickup. Immediately after that incident, the arson surveillance was established at his residence, and the defendant was observed leaving his apartment at 3:10 A.M. with three cylindrical objects that looked like pipe bombs, which he then threw into a nearby river. When the defendant drove his truck away from the apartment, parked it in a driveway, and walked away, law enforcement officers peered in and saw a Molotov cocktail, explosives, and padlocks that looked like ones that had been cut off at PG& E facilities in the earlier incidents. Only then did officials search the defendant's apartment.

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[26] Arvizu, *supra* note 22, at 751. Internal citations omitted.

[27] *Id.* at 752.

[28] 122 S. Ct. 587 (2001).

As in *Arvizu,* a trial court in California and the Ninth Circuit agreed that the search violated the Fourth Amendment but were, in turn, reversed by the Supreme Court. The Court, which held that the search was constitutionally sound and supported by reasonable suspicion, even noted the defendant's having been placed on probation for a drug offense with the court-ordered condition, common in California, that he had to submit to warrantless searches by probation officers or any law enforcement officials at any time without a search warrant, arrest warrant, or reasonable cause.

The Court referred to *Griffin v. Wisconsin*[29] wherein it considered warrantless searches of probationers by probationary officers, in conformity with a state regulation which allowed such a practice as long as it was approved in advance by a supervisor based on reasonable grounds to believe that contraband was present. In *Griffin* the Court upheld the search in recognizing the special need to monitor probationers to ensure they are fulfilling the terms of their probation. Further, since *Griffin* had built-in limitations, the Court seemed to restrict the use of searches to considering whether probationers were complying with the terms of their probation.

The *Knights* Court sidestepped the major constitutional implications of the case such as whether the probation condition removed the defendant's reasonable expectation of privacy or whether it could constitute constitutionally valid, ongoing consent to a search because it ultimately found that the search was supported by reasonable suspicion. Although the Court avoided important constitutional issues in not addressing the validity of the regulation itself, it did illuminate the standards for such searches and declared that reasonable suspicion would still be necessary to search a probationer's house even though such a requirement was not listed in the condition of probation "agreement." The Court vaguely discussed balancing state interests and an individual's Fourth Amendment rights in the face of the higher likelihood that probationers may be involved in criminal activity. Even so, the Court did send a clear message that some form of individualized reasonable suspicion is required in such situations in writing that "[t]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable."[30]

That the Supreme Court used reasonable suspicion as the standard in *Knights*, when it was also supported by a probation "agreement," seems instructive. In *Knights*, the Court applied a relatively vague and undefined reasonableness standard but did uphold that some clear type of individualized reasonable suspicion is required no matter what agreements a probationer has entered into. In school settings, this may be applicable in establishing behavioral intervention plans, conditions, and other agreements under which students may be said to have consented in an ongoing way to searches. Consequently, no matter how clear such agreements are or appear to be, and even when public policy and safety considerations are weighty, some form of individualized reasonable suspicion is still generally required.

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[29] 483 U.S. 868 (1987).

[30] *Id.* at 592.

In *Kyllo v. United States*,[31] the Supreme Court examined the impact of new imaging technologies on the Fourth Amendment rights of individuals where law enforcement agents in Oregon used a thermal imaging device to scan a residence in an attempt to discover whether an individual was growing marijuana plants with the aid of high-intensity lamps. The device revealed that, consistent with the use of indoor grow lamps for production of marijuana, the garage roof and one side wall were unusually hot compared to the rest of the home and neighboring homes. Based in part on the thermal imaging, a federal judge issued a search warrant that produced evidence that the defendant was growing marijuana in his residence.

The *Kyllo* Court decided that the use of sense-enhancing technology to scan the interior of a home in ways that could not have been available without a physical intrusion into the building constituted an impermissible search under the Fourth Amendment. The Court indicated that while visual surveillance and observation of a home from the outside does not constitute a search, scanning or using surveillance enhancement via various technologies could threaten Fourth Amendment rights of individuals and put them at the mercy of the technological advances.

In the wake of the technology revolution, schools are relying on such devices as video cameras and metal detectors. Other technologies may soon become available to detect weapons in areas without the aid of traditionally visible weapons detectors. As technology advances and schools come to rely on more sophisticated equipment, the issue of whether these devices constitute a search will be defined to a large extent by *Kyllo* unless the Court develops exceptions for educational settings.

When staff at a state hospital in South Carolina became alarmed at their perception of an increase in the use of cocaine by prenatal patients, without their consent, they began to conduct urinalyses of pregnant women who had certain symptoms. If the tests were positive for cocaine use, they were carefully protected as evidence and turned over to prosecutors to bring child abuse or neglect charges against these mothers. In *Ferguson v. City of Charleston*,[32] the Court struck down lower court rulings that permitted the testing. The Court believed that since there was no special need or other circumstance to justify the use of suspicionless or warrantless searches, the urinalyses violated the Fourth Amendment rights of the patients.

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[31] 121 S. Ct. 2038 (2001).

[32] 121 S. Ct. 1281 (2001).

For educators, *Ferguson* can be read as a companion piece to *Vernonia School District 47 J. v. Acton*,[33] which dealt with suspicionless urinalysis of students involved in high school sports. *Ferguson* may not only signal that the Court is loath to extend *Vernonia* any further but may also appear to argue against similar use of testing in alternative high schools and/or for young mothers in similar circumstances.

Intellectual Property

J.E.M. Ag Supply v. Pioneer Hi-bred International[34] should be of some interest to higher education institutions dealing with intellectual property issues and genetic research. At issue was whether standard utility patents and their extensive protection could be issued for plants under 35 U.S.C. § 101 or whether the exclusive authority to protect developers of plant varieties and hybrids is the Plant Variety Protection Act[35] along with the Plant Patent Act of 1930.[36] The Court affirmed that newly developed plant breeds are patentable subject matter. The import of this question is that utility patents provide extensive protections for patent holders with slightly different and lesser protections against reproducing, selling, or using plants or plant varieties under the latter specific statutes on plants and plant varieties. For example, under the latter, more specific, acts (as opposed to utility patents) farmers purchasing hybrid corns or other plants have the right to raise the plants or corn and preserve some for seed for use on their own farms. Under utility patents, farmers are limited to only raising the corn for foodstuff or feed purposes with no right to reproduce the plants for any purpose for seed.

The Court reasoned that developers of plant varieties and plant matter can qualify for basic utility patents. Since genetic material development is a central research objective of many colleges and universities, the protections of each statute and their requirements to qualify for patent protection separately should now be considered by intellectual property administrators and their attorneys. If new technologies and methodologies can create incentives to reproduce types of plant materials, either sexually or asexually, it might be useful for patent seekers to consider the broader protection of utility patents for their plant varieties and other living matter.

In *New York Times Company v. Tasini*[37] the Supreme Court clarified significant copyright issues dealing with authors who contribute to journals or publications that are redistributed to services such as University Microfilms International (UMI), LexisNexis, and Westlaw. Insofar as such distribution is a common practice, *Tasini* should be of interest to colleges and universities that publish academic journals as well as to librarians, other collection preservers, and academic authors. The Court ascertained that unless there is an express transfer of copyright by a freelance or other type of contributing author, the Copyright Act only allows the owner of a collective copyright in a journal or collection to publish it or to republish the work "as part of that collective work, any revision of that collective work, and any later collective work in the same series."[38] The Act does not give the collective copyright holder or magazine the right to license the articles to electronic publishers. According to the Court:

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[33] 515 U.S. 646 [101 Educ. L. Rep. 37] (1995).

[34] 122 S. Ct. 593, 596 (2001).

[35] 7 U.S.C. §§ 2321 *et seq.*

[36] 35 U.S.C. §§ 161-164.

[37] 121 S. Ct. 2381 (2001).

> Under § 201(c)'s terms, a publisher could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from one edition of an encyclopedia in a later revision of it, but could not revise the contribution itself or include it in a new anthology or an entirely different collective work. Essentially, § 201(c) adjusts a publisher's copyright in its collective work to accommodate a freelancer's copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others. It would scarcely preserve the author's copyright in a contribution as contemplated by Congress if a print publisher, without the author's permission, could reproduce or distribute discrete copies of the contribution in isolation or within new collective works.[39]

The net result is that publications with collective copyrights can reprint collections together and can reprint an article as a revision of a journal. However, the relatively common practice of collective copyright holders' licensing articles from contributing authors to services such as UMI, LexisNexis, or Westlaw, which make them available without any formatting from the original collection or journal, and without connection to the other articles in the original magazine or journal, violates both the Copyright Act and the copyrights of the original contributing authors absent a specific provision in the original agreement. Universities which publish academic journals and others who have collective copyrights to journals would be well served to include provisions in their copyright agreements with authors outlining the provisions for licensing with electronic publishers for subsequent publication of articles that appeared in their journals. In addition, libraries and universities entering into such licensing agreements with collective copyright holders should make certain that individual authors have agreed to the electronic dissemination and reproduction of their articles.

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[38] 17 U.S.C.A. § 201(c).

[39] Tasini, *supra* note 37, at 2381, 2388-2389.

Disability Law

The Court continues to limit and define the contours of actions under the Americans with Disabilities Act (ADA). In *Toyota Motor Manufacturing, Kentucky v. Williams*,[40] the Court added to its earlier decisions in *Albertson's v. Kirkingburg*,[41] *Sutton v. United Air Lines*,[42] *Murphy v. United Parcel Service*,[43] and *New York State Board of Law Examiners v. Bartlett*.[44] In these cases, the Court seems to have defined individuals who are considered as having a disability, and thus those who must receive "reasonable accommodations," relatively narrowly. For example, in *Sutton*, the Court determined that those whose disabilities can be corrected or alleviated using corrective devices such as eyeglasses or medication are no longer regarded as having a disability. In other words, if, through the use of corrective devices, individuals are not regarded as having disabilities that limit a major life function, they do not fall under the protection of the ADA. In such a situation, these individuals are not entitled to reasonable accommodations in order to retain their jobs, benefit from a program, or use a public carrier or public accommodation.

Toyota involved an employee who claimed that she developed carpal tunnel syndrome while working on an automobile assembly line. After Toyota denied the worker's request for an accommodation, a federal trial court granted the company's motion for summary judgment but the Sixth Circuit reversed in positing that she was covered by the ADA because she was substantially limited in the major life activity of performing manual tasks. The Sixth Circuit applied the standard that the worker only had to prove that her manual disability involved a class of such activities that affected her ability to perform her tasks at work. As part of its rationale, the court rejected Toyota's argument that the employee's ability to complete basic household tasks and personal hygiene chores meant that she could not be covered under the ADA.

Reversing in favor of Toyota, the Supreme Court was of the opinion that evidence of inability to perform basic tasks associated with work or a class of manual activities is insufficient to qualify an employee under the ADA. The Court specified that the worker's inability to perform repetitive work which required her to extend her arms at or above shoulder level was irrelevant to the major life tasks in most people's lives such as brushing one's teeth, bathing oneself, and other manual tasks. The Court concluded that, based on the ADA, in order to define one as having a disability that would require an employer (and perhaps others) to make accommodations, an individual must have an impairment that substantially limits major life activities, meaning those that are of central importance to daily life and are not limited to the activity of work.

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[40] 122 S. Ct. 681 (2002).

[41] 527 U.S. 555 (1999).

[42] 527 U.S. 471 (1999).

[43] 527 U.S. 516 (1999).

[44] 527 U.S. 1031 (1999).

The striking outcome of *Toyota* is that if an employee develops a physical condition, such as carpal tunnel syndrome, while working in a repetitive job, as long as the individual can continue to care for himself or herself in basic ways such as hygienic tasks, but can no longer do the work that caused the injury, the employer is not required to make a reasonable accommodation to permit the individual to continue working. The important standard that the Court established is that it made matters more difficult for claimants by requiring them to provide individualized evidence touching on major life activities in each case.

At the same time, the Court clarified that working in general is not a major life activity in and of itself. Previously, in *Sutton*, the Court displayed an unwillingness to define work as a major life activity unless a broad class of types of work was implicated. It is this perspective that may have mistakenly led lower courts to believe that all that a claimant needed to prove was a limitation in performing a class of manual activities that might be implicated in other work settings. The Court referred to regulations promulgated under the Rehabilitation Act for a list of those activities, including "walking, seeing, hearing" and performing "manual tasks," that do constitute "major life activities."[45] The Court, seeking guidance in evaluating what constitutes substantially limits—language that was specifically left out of the regulations—turned to the Equal Employment Opportunity Commission's regulations that define the issue for purposes of applying the ADA: "substantially limit[ed]" means "[u]nable to perform a major life activity that the average person in the general population can perform;"or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[46]

The Court is clearly uncomfortable decreeing that an impairment at work is a major life activity. As such, an individualized assessment of each alleged impairment is necessary in each case. This is especially important, wrote the Court, in cases alleging carpal tunnel syndrome since the etiology and outcomes of this condition vary widely. *Toyota* may become important in educational settings if the Court's careful and narrow rationale is applied to school employees and students. For example, the mere fact that a student, through inability to perform a certain class of manual tasks, cannot access an important piece of laboratory equipment without some accommodation may not toll the ADA's protections. It may be that proof of a student's disability vis-a-vis basic life issues, such as household chores and personal hygiene, will be required before reasonable accommodations must be provided.

In the high profile case of *PGA Tour v. Martin*,[47] a professional golfer who suffered from a circulatory disorder that resulted in a malformation of his right leg sued the Professional Golf Association Tour (PGA), alleging that it violated the ADA by banning the use of golf carts in tournaments. The golfer's disability clearly qualified under the ADA. The key provision in dispute was title III of the ADA, which requires a public accommodation to make reasonable modifications to allow persons with disabilities to utilize them and that "no individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the … privileges … of any place of public accommodation," unless "the entity can demonstrate that making such modifications would fundamentally alter the nature of such … accommodations."[48] At issue was whether the PGA had to accommodate the golfer's disability by allowing him to use a cart or whether doing so would have fundamentally altered the nature of the sport.

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[45] 45 CFR § 84.3(j)(2)(ii) (2001).

[46] Toyota, *supra* note 40, at 681, 690, citing 29 CFR § 1630.2(j) (2001).

[47] 121 S. Ct. 1879 (2001).

A divided Court contended that allowing the golfer to use a cart did not fundamentally alter the nature of the accommodation or competition. In highlighting its notion that judgments about making accommodation must be individualized, the Court defined "fundamentally alter" as something that changed an essential aspect of the game, such as the diameter of the hole, even though it would have affected all competitors equally. The Court pointed out that a simple or peripheral alteration that would give a player with a disability an advantage in competition would be a fundamental alteration that is not required under the ADA. Based on this rationale, the Court maintained that the use of a golf cart did not change the fundamental nature of golf which it described has always been essentially "shot-making" rather than walking.

Martin highlights the importance of making reasonable accommodations for students with disabilities in extracurricular and sporting activities. *Martin* also provides some basic guidance over the types of accommodations that may be required and which may be fundamental alterations that are not necessary.

Conclusion

The cases in this chapter illuminate areas of concern to educators and their counsel that they may not have noticed or read because they did not appear to be directly applicable to schools. Certainly, the Supreme Court continues to shape First Amendment, search and seizure, and disability law in ways that affect practices in educational settings. These cases shed light on the Court's thinking in an array of areas and certainly merit careful scrutiny by educators and their attorneys to observe whether state judicial and legislative responses to them must be pursued.

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[48] 42 U.S.C. § 12182 (b)(2)(A)(ii).

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11

AUSTRALIA

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Introduction

Sexual abuse of school students has become a major concern in Australia where incidents involving school staff, in some instances occurring several decades ago, come before the nation's courts. In this regard it is well noted by Wilson J(udge) that "sexual abuse of children is surely one of the most appalling examples of deviant behaviour, with the potential to wreck young lives. Allegations of that type of abuse must be taken seriously and thoroughly investigated. Complainants must be treated with respect and sensitivity."[1]

It is apparent, however, as a recent Commission of Inquiry has revealed, that the extent of sexual abuse against school students is much wider than previously believed.[2] Moreover, of considerable concern is the fact that the mandatory reporting of child sexual abuse required by teachers in schools, at least in one Australian State, was until recently largely ignored.[3] Additional evidence is available that adequate systems to report and investigate allegations of sexual abuse of students have not been implemented in some schools.[4]

Various statutes exist in all Australian jurisdictions, including the Commonwealth, making sexual abuse of children a criminal offence. This type of legislation is, of course, reactive in nature. On the other hand, there is a broad range of statutes, such as various antidiscrimination laws with their proactive purposes of protecting persons, that frequently contain specific provisions dealing with sexual harassment. Nonetheless, it has been largely the increasing number of cases of sexual abuse of minors coming before the courts that has led State and Territory governments to introduce legislation to deal directly with the problem.[5]

A number of Australian jurisdictions have Boards of Teacher Registration which have powers to investigate allegations of sexual and other abuse by teachers against students. In the state of Queensland, for example, legislative provision[6] is made to only employ teachers who are of good character.[7] The Education Act also contains provisions dealing directly with investigations and reporting of allegations of sexual offences.[8] The Act gives the board authority to apply penalties to teachers in disciplinary matters that range from a fine to cancellation of registration, thus effectively ensuring that person cannot teach in Queensland schools.[9]

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[1] S v. The Corporation of the Synod of the Diocese of Brisbane, Supreme Court, Queensland No 72 of 2000 at 1481.

[2] The *Royal Commission into the New South Wales Police Service* (the *Wood Royal Commission*) and particularly the sections dealing with the Commission's Inquiry into Paedophilia. August, 1997 Vol IV.

[3] *Id.* at 958.

[4] *Supra* notes 1-2.

[5] For example in New South Wales: Children and Young Persons (Care and Protection) Act, 1998; Commission for Children and Young People Act, 1998; Child Protection (Prohibited Employment) Act 1998. In Queensland the legislation includes: the Child Protection Act 1999; Commission for Children and Young People Act, 2000.

[6] Education (Teacher Registration) Act (1988) (Qld).

[7] *Id.* § 37.

[8] *Id.* § 44A and § 50.

In light of these concerns, this chapter examines recent cases involving the sexual abuse of, or alleged inappropriate touching of, students in school settings. The discussion begins with an analysis of two cases dealing with appeals against dismissal on the grounds of improper dealing with students. In one of the two cases the dismissal, which was upheld, was largely due to a failure to follow the very definite and clear instructions of a principal not to touch students. In the other case, the dismissal was struck down as unjustified where the employer's failure to articulate clearly its requirements was an important factor. The chapter then examines recent cases dealing with possible extensions of the grounds on which educational employers might be liable for sexual or similar assaults on students by teachers.

Appeals Against Dismissal

The first case[10] concerned a teacher's application for reinstatement under Commonwealth industrial relations legislation.[11] The applicant, a former teacher at a Roman Catholic primary school for thirteen years, was dismissed for "inappropriate physical contact with a student or students in deliberate breach of a reasonable direction which had been given to him."[12] There was no argument that the applicant was anything other than a dedicated teacher and was generally well accepted by students and their parents. However, the evidence of the teacher's dismissal indicates that over a period of years he disobeyed the school's policy and directions of not touching students. Yet, at no time was there ever any suggestion of sexual impropriety. The allegations, all associated with female students, which were the basis for the teacher's dismissal included walking on a beach during a school event with his arm around a student, frequently being seen with his arm around a student on school grounds, asking a student to sit on his lap, placing his arm around a student and having his lips on her neck, and being alone in a classroom with a student contrary to direct instructions not to do so.

All teachers in the school were required to attend a Protective Behaviours course at which they were informed of advice to be given to students concerning bullying and other abusive behaviors. At this course officials announced that the only time it was permitted to touch a student was when there was a medical or other emergency. Nonetheless, despite this clear warning, as well as the fact that staff members were given an article to read on the perils of touching students, the teacher frequently engaged in tactile behavior with female students. Six months after the policy was announced to the staff, the principal had to warn the teacher that he was putting his job at risk by ignoring it. The teacher continued to ignore the policy and two months *after the* principal's verbal warning, she sent him an official letter advising him that if he persisted in touching students he could be dismissed. The letter stated, in precise and unmistakable terms, that the teacher was neither to touch nor to be alone with female students. The teacher continued to ignore the instructions and, at a meeting with the principal and the school registrar, was formally warned that further behavior of this kind would result in his dismissal. As the teacher was yet again observed breaching the rules set down and was the subject of a parental complaint against his having touched their daughter, he was dismissed.

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[9] *Id.* § 70.

[10] Puccio v. Catholic Education Office, (1996) 68 IR 407. Industrial Relations Court of Australia.

[11] Specifically § 170EA, *Industrial Relations Act*, 1988, (Commonwealth).

[12] *Supra* note 10, at 407.

The Industrial Court had only to determine whether the dismissal was lawful. It was not required to address whether the teacher's behavior in touching students was improper. The teacher admitted to the allegations but, in mitigation, pointed out that he informed the principal and other staff that he was a tactile person who believed he should be able to touch students in the manner he had. The Court had no difficulty in deciding that the dismissal was indeed lawful:

> The direction given to the applicant by [the principal] to cease all physical contact with students was an instruction lawfully and reasonably given. It was an instruction directed both to the safety and welfare of the students, and also to the welfare and protection of the teachers .... As a direction for the safety and welfare of the students it was in line with the community standards and expectations recognized by the Protective Behaviours course.[13]

A later case[14] provides a useful contrast. In an appeal from the Queensland Industrial Relations Commission,[15] the Industrial Court of Queensland had to consider the lawfulness of the dismissal of a teacher from a government school in 1997. In this case the teacher was dismissed on the ground that rubbing his hand against the thigh and hip regions of an eleven-year-old female student amounted to misconduct within the meaning of the Public Service Act of 1996.

The background facts to this case were that in 1993 the teacher was charged in Magistrate's Court with unlawful aggravated assault on a grade five female student. Although the teacher was found guilty, the Queensland Court of Appeal set the verdict aside and ordered a new trial involving ten counts of aggravated assault. The Magistrate determined that, while the teacher was guilty of nine counts of common assault, no conviction should be recorded. On further review, the Queensland Court of Appeal overturned all of the convictions and allowed acquittals on each charge. At this point, the teacher, who had been dismissed as a result of the ruling of the Magistrate's Court, was reinstated by the Department of Education in a letter from the Director General of Education which read in part:

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[13] *Supra* note 10, at 415.

[14] Queensland Teachers Union of Employees and Department of Education (No. C42 of 1999) 125.

[15] Brought under the Industrial Relations Act (1999)(Qld) – specifically § 341(i) appeal from decision of Industrial Commission.

> It is noted that you have been acquitted of all findings of guilt against you. Perusal of the relevant court transcripts has been undertaken and I have decided that there is no basis on which to proceed with Departmental disciplinary action against you pursuant to section 29 of the Public Service Management Employment Act 1988. However, I must caution you in relation to your actions as a teacher and advise that inappropriate physical contact towards any student will not be tolerated. Not only does such action contain potential for legal action on the grounds of assault, but may also result in disciplinary action in accordance with section 29 of the Public Service Management Employment Act 1988 being taken against you. In this regard, I would suggest that you review your behaviour and undertake any necessary modifications in relation to inappropriate physical contact with students.[16]

Here, the Industrial Commissioner decided that the teacher had not rubbed the student's thigh and hip regions but touched the student on her right thigh between the middle to outer thigh in a brief, gentle, nonsexual way following her complaint of "itchy bites." While the court took a range of factors into account, it is evident that the vagueness of the caution from school officials, expressed only in terms of inappropriate physical contact against a background of the teacher's having been informed that the earlier matters provided no basis on which to proceed with disciplinary action, clearly played a role in the ultimate decision by the Industrial Court to order that the teacher be reinstated. These cases are a good illustration of the importance to education employers of clearly expressing their instructions or expectations to employees.

Recent Sexual Assault Cases: Possible Employer Liability

With so many victims of sexual assault in schools and other organizations bringing allegations forward, often long after an event, there has been a dramatic global increase in damages actions for sexual abuse compensation. Victims naturally seek grounds on which a school authority can be held responsible for such abuse. In Australia, there are a number of possibilities. A school authority may be liable first on the basis of its own negligent failure, for example, to have proper systems in place, negligence in staff selection in induction or training, or systemic failures to respond to complaints or allegations.

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[16] *Supra* note 14, at 126.

The second basis on which a school authority may be responsible is *vicarious liability. This is the imposition of legal responsibility* on an employer, even though it is free from blame, for a civil wrong committed by an employee in the course of employment. Vicarious liability is based on policy grounds and involves attempts to resolve the conflict between the social interest in providing an innocent victim with an effective remedy against a financially substantial defendant and a reluctance to impose an undue burden on a blame-free employer. One of the difficult areas arising is whether an employer should be made responsible for a wrongful act that is often the very opposite of what an employee is engaged to do. The established Australian position is that an employer is not responsible for such an act unless it is carried out in the course of employment and that is only the case where the wrongful act is authorized or is "a wrongful and unauthorised mode" of doing an act authorized by the employer. The latter phrase has caused considerable difficulty in application. Australian courts have consistently held that independent and personal acts of misconduct by any employee fall outside the doctrine of vicarious liability. Until recently, most considered that sexual abuse by a teacher of a student was clearly an independent and personal act of misconduct.

Vicarious liability extends to negligence by employees other than the perpetrator but, on orthodox principles, not to the intentional wrong of sexual abuse by an employee. Recent decisions of Canadian and English courts reformulating the principles in ways which, in some circumstances, may impose vicarious liability on school authorities for intentional wrongs such as sexual abuse have not been adopted in Australia. Even so, these cases will apparently be considered in the near future before the High Court of Australia.

The third basis on which a school authority may be liable in Australia is the "nondelegable" duty of care. The courts have recognized that relationships such as employer/employee, landlord/tenant, hospital/patient and school/pupil give rise to a nondelegable duty. This duty imposes a higher standard of care and requires the person, such as a school authority, owing a nondelegable duty of care not only to exercise reasonable care for the functions it carries out itself but also to ensure that reasonable skill and care are taken in relation to those functions which it leaves to others, such as independent contractors or employees. Thus, the principal purpose of this part of the chapter is to examine recent Australian cases in which the nondelegable duty of care concept has been applied to sexual abuse by teachers.

The High Court of Australia has granted leave to appeal two cases arising from sexual assaults of students by teachers where the central question was whether the relevant school authority (or any other employee or agent but the perpetrator) could be held directly responsible without fault for a teacher's actions by the authority. In the first, a former teacher at a one-teacher school in a rural area of Queensland had been found guilty of assault, including rape, and sentenced to prison.[17] The incidents involved two female students thirty-five years earlier when they were aged seven and ten. The victims brought a personal action in the District Court of Queensland, claiming that all three defendants owed them a duty of care to ensure that reasonable care was taken of them while they were at school and that, as a consequence of its being breached, they suffered injuries and losses including indignity and humiliation. When the court rejected the students' claim that the defendants owed them a duty of care, they sought further review at the Queensland Court of Appeal.

The central issue both at trial and on appeal was whether the State could be liable for the negligence and trespass of one of its employees, the third defendant. Although there was no allegation of the State's being vicariously liable for the teacher's actions, the court did comment on that doctrine to the effect that the orthodox principles continued to apply. As McPherson J(udge) A(ppeal) noted:

> [I]t remains the law in Australia that an employer is generally not vicariously liable for an assault by an employee that is an independent personal act not connected with or incidental in any way to work the employee is expressly or impliedly authorised to perform.[18]

He concluded that:

> Nothing can be clearer than that the assaults alleged to have been committed here were independent and personal acts of misconduct by D'Arcy. They were in no sense capable of being regarded as methods of conducting his teaching function, but were done in utter defiance and contradiction of it and of his duties as an employee of the State.[19]

The question to be answered was whether the State could be directly responsible for the teacher's actions based on its having failed to discharge its nondelegable duty of care. That is, to argue that there is:

> personal negligence on the part of the employer which, if established, gives rise to an original and not a vicarious liability in the employer. The master is liable not because a servant has committed a wrong for which the master is responsible in law as the wrongdoer's supervisor, but because the master has himself failed to fulfil his duty to take care for the safety of the person injured. The duty is original and not derivative or vicarious.[20]

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[17] Rich v. State of Queensland & Ors; Samin v. State of Queensland & Ors [2001] QCA 295.

[18] *Id.* at 4.

[19] *Id.*

[20] *Id.*

McPherson JA pointed out that an earlier judgment of the High Court of Australia, which has been open to considerable debate and a variety of interpretations, declared that "a school's primary or original duty is non-delegable."[21] He argued that the duty does not impose:

> a form of absolute duty or liability to keep them safe from all kinds of harm at all times. It is not to be equated with a warranty, promise or undertaking to indemnify or hold them harmless against injury. It goes no further than a duty by the State requiring it to take reasonable steps to prevent them from being harmed.[22]

In essence, as the Court recognized, any liability on the part of the State needed to be based on an omission by one of its officials to take reasonable steps to foresee and prevent the sorts of incidents that were the cause of the action's having arisen. Further, as McPherson JA maintained, in order for the State to be liable, the plaintiffs had to show more than that they were assaulted by the teacher at school and that his actions were sufficient to establish that reasonable care had not been taken for them. He added that "[w]ithout more, such an assertion fails to identify, allege and plead any matter of fact showing that the State omitted some precaution reasonably needed to ensure their safety."[23]

After noting that there was no vicarious liability involved, Thomas JA addressed the issue of the State's nondelegable duty of care to students. He agreed with McPherson JA "the authorities do not support such a proposition"[24] before asserting that:

> The term "non-delegable" is sometimes misunderstood. It does not mean that the State cannot delegate or employ agents to do the necessary work of running schools. It means only that the party who delegates the performance of a task is not permitted to say "I have washed my hands of the risk by engaging someone else to do it." The correct general statement of the State's duty … is that it was under a non-delegable duty to exercise reasonable care to ensure the safety of students at its schools.[25]

Williams JA, the third member of the court, in agreeing with McPherson JA and Thomas JA wrote that:

> Even where the duty is "to ensure that reasonable care is taken" it is still incumbent on the plaintiff to allege and prove that reasonable care was not taken. That will normally involve alleging that in some circumstances known to the party on whom the duty was

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[21] *Id.* at 6.
[22] *Id.*
[23] *Id.* at 7.
[24] *Id.* at [illegible]
[25] *Id.*

> imposed that some step should have been taken which was not taken.[26]

After considering cases that mainly addressed the issue of vicarious liability, Williams JA ascertained that litigation recognized that "an institution could be directly liable in negligence for any of the following failures on its part: negligent hiring; negligent training; negligent supervision; failure to terminate employment; failure to provide counseling; failure to investigate allegations; failure to report abuse."[27]

Thomas JA relied on a Canadian case which observed that "[i]f school boards are to become insurers for all the actions of their employees then that is a policy choice that must be made by Members of the Legislative Assembly."[28] He concluded that if the plaintiff's case was to be accepted, then:

> a school authority would become strictly liable, virtually it would become an insurer, for any and all injury sustained by a child whilst at school, howsoever caused. I agree with the majority of the Supreme Court of Canada in saying that if school authorities are to become insurers for all of the actions of their employees then that is a policy decision that must be made by the appropriate legislature.[29]

In sum, a unanimous court contrasted starkly with a recent decision handed down by the Court of Appeal of New South Wales (NSW). In the case from NSW, the second case given leave to appeal to the High Court of Australia, a primary school teacher punished a seven-year-old boy by beating him on the bare bottom, at times with sexual overtones.[30] The original Statement of Claim alleged that, on a number of occasions, the teacher took the student to a storeroom where he made him undress and fondled him. The suit claims that on further occasions, the teacher brought other students to the storeroom and fondled them in front of the plaintiff. The events took place in 1978, the same year that a criminal action was initiated against the teacher when the student informed his parents of the assaults. The teacher was arrested and pleaded guilty in the Court of Petty Sessions to four cases of common assault, was fined $300, and put on a good behavior bond. As a further condition of his sentence, the defendant was not to accept any teaching appointment involving children under sixth class. It is interesting that the Magistrate expressed concern that the teacher did not face more serious charges since he contravened the Education Department's policy for disciplining students and the principal had no knowledge of his behavior. The teacher subsequently resigned from the teaching service.

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[26] *Id.* at 13.

[27] *Id.* at 14.

[28] GT v. Griffiths (1999) 174 DLR (4th ed.) 71.

[29] *Supra* note 17, at 16.

[30] Lepore v. New South Wales & Anor [2001] NSWCA 112.

In a 1999 common law action, the State of New South Wales was entered as first defendant and the teacher, although he did not appear, was entered as second defendant. The trial judge held that there was no negligence on the part of the employees of the education authority even though the teacher was liable. Importantly, the trial judge acknowledged the responsibility of the Department of Education to provide a safe learning environment for students. He wrote:

> There was not any dispute that the first defendant owed the duty to the plaintiff that a teacher owes to a pupil. The breach of duty alleged was that the first defendant failed to take reasonable care to protect the plaintiff from a reasonably foreseeable risk of injury in that it failed to adopt a system of supervision and it failed to adequately supervise the second defendant when he was carrying out his teaching duties.[31]

The judge ascertained that the teacher, who was qualified and experienced, worked under the direct supervision of the head mistress of the primary school who had specific supervisory responsibilities to follow. In finding that the State had not breached its duty of care to the plaintiff, Downs J declared that "[t]he assaults alleged were deliberate and isolated acts of abuse which occurred in an enclosed room and which were inimical or totally foreign to the second defendant's duties as a teacher."[32] He then listed a number of factual bases for his judgment, including a lack of evidence of the time period over which the incidents took place, the length of time of the actual assaults, and lack of knowledge in that no staff from the school or department had witnessed, knew of, or had any reason to believe the defendant would commit the assaults. Nor was there any evidence to suggest that the teacher might engage in such assaults and, importantly, "there is no evidence as to what system of work or supervision might reasonably have been implemented so as to avoid the isolated assaults which took place."[33]

In the NSW Court of Appeal the main thrust of the appellant's submission was that the trial judge failed to address the issue of nondelegable duty of care. In the words of Mason P(resident), "[t]he specific issue is whether the non-delegable duty of care owed to school pupils is breached by the intentional misconduct of an employee teacher where negligence of supervisors and system is negated."[34]

The appellant asserted that the trial judge had not given sufficient consideration to the State's nondelegable duty to ensure that reasonable care was taken for his safety. In essence, the argument was that the State was responsible for the teacher's actions since, as his employer, its responsibility extended to situations where he might have acted outside the terms of his employment. It is significant to consider that vicarious liability was not an issue here even though Mason P referred to the fact that some text writers had seen nondelegable duty as "a disguised form of vicarious liability."[35]

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[31] *Id.* at 6.

[32] *Id.* at 7.

[33] *Id.*

[34] *Id.* at 2.

Mason P explained that a nondelegable duty is not met merely by the employment of expert staff. Rather, he was of the view that the duty extends to cover situations where an employee's actions may be seen to be clearly not associated with his or her official responsibilities. He noted in relation to whether a nondelegable duty of care could be held for an intentional tort that:

> the attribution of vicarious liability or a non-delegable duty of care are situations where legal responsibility is fixed upon an innocent party by reason of some antecedent relationship with the victim and some capacity to control the conduct of the wrongdoer.... the defendant upon whom a "direct" or "personal" non-delegable duty is imposed is treated as if it had undertaken directly with the plaintiff to ensure that no harm befalls the plaintiff (within the sphere of protection undertaken) as the consequence of wrongdoing. Viewed thus, there is no basis for distinguishing between negligently inflicted harm and intentionally inflicted harm.[36]

Mason P ruled that the State of New South Wales did owe the appellant a nondelegable duty of care. In essence the duty arose from:

> the entrustment of children into the virtually exclusive care of the educational authority in school hours and on school premises. I see no compelling policy reasons why the scope of that non-delegable duty should not extend to protecting the pupil from the intentional as well as negligent wrongs of the agents that the educational authority put in charge of the pupil. ... [But] here the wrongdoer was the State's employee, he was put in control over young children, he was on school premises and he was able to use his actual authority to administer discipline as the pretext to secure the submission ... of his vulnerable victims.[37]

In a concurrence, Davies A(cting) JA, Mason P added that "[i]n my opinion the State's obligations to school pupils on school premises and during school hours extends to ensuring that they are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally)."[38]

In an important dissenting judgment, Heydon JA suggested that, had the appellant been successful, "an unprecedented form of strict liability for the conduct of teachers and others having the charge of children would have been recognised."[39] Much of the dissent rested on the argument that the case

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[35] *Id.* at 8.

[36] *Id.* at 10.

[37] *Id.* at 11.

[38] *Id.*

[39] *Id.* at 12.

"is replete with procedural obscurity, and characterised by a peculiar narrowing of the issues."[40] In particular, Heydon JA argued that the precedent case[41] on which much of the argument concerning nondelegable duty of care rested was "questionable." He acknowledged that:

> The intentional causing of physical injuries by batteries is tortious because to commit a battery is morally wrong. To impose strict liability on an employer for morally wrong batteries by employees in circumstances where the batteries are not only outside the employment but are wholly antithetical to and a very negation of the duties which the employment imposed, in circumstances where it has been found where the employer was in no respect negligent, calls for some explanation. This the appellant has not provided. Nor is any explanation to be found in any of the authorities to which the appellant referred.[42]

Given the great differences in the two cases that will appear before the High Court of Australia, issues surrounding nondelegable duty of care should receive detailed examination. It is understood that vicarious liability issues will be considered, even though it was not originally argued, in the light of the Canadian and English cases.

The final case involves the sexual assault of a female student who attended an independent coeducational school.[43] In the case, which was heard before a judge and jury, the student sought exemplary as well as compensatory damages. As it was a jury trial, the discussion here is based on the judge's summing up of the case to the jury. Insofar as the male teacher involved in this case committed suicide prior to its commencement, the issues addressed by the court largely dealt with vicarious liability and nondelegable duty of care.

The events complained of, which were admitted by the defendant education authority, the Synod of the Diocese of Brisbane, took place during the middle of 1990 during the twelve-year-old plaintiff's first few months at the secondary school as a year seven student. It was accepted that the student had been "repeatedly subjected to assaults of a sexual nature … which included fully undressing her, fondling her breasts and genitals, digital penetration of her vagina and forcing her to fondle his penis."[44]

In directing the jury, Wilson J pointed out that a plaintiff had to prove the normal elements of the tort of negligence, namely the existence of a duty of care, a breach of the duty by failing to take reasonable care, and the injury or damage that was suffered was the result of the breach. The judge went on to explain that a duty of care is owed where the person owing the duty can reasonably foresee that his or her conduct may cause loss or damage but that the precise nature of the harm does not have to be reasonably foreseen as it is enough for the plaintiff to show that some harm could eventuate from the complained-of behavior. In relation to the standard of care owed, the judge instructed the jury that the plaintiff:

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[40] *Id.*

[41] Commonwealth v. Introvigne (1982) 150 CLR 258.

[42] *Supra* note 30, at 19.

[43] *Supra* note 1.

[44] *Id.* at 1451.

> has to prove that the alleged wrongdoer failed to take reasonable care in the circumstances by failing to do what the reasonable person would have done or by doing what the reasonable person would not have done.... The law says that a risk of injury is reasonably foreseeable if it is not far fetched and fanciful.[45]

In considering what a reasonable person would do to respond to a foreseeable risk of harm, the judge informed the jury that it is necessary to consider the magnitude of the risk and the extent to which it probably might happen as well as "the expense, difficulty and inconvenience of taking alleviating action; and any other conflicting responsibilities the wrongdoer may have had."[46] The judge further instructed the jury that there were two ways that a defendant can be liable in negligence: by breaching a duty of care, which she referred to as the "primary way" and by the principle of vicarious liability. As far as primary liability was concerned, the judge reminded the jury that the defendant Synod owned and operated the school and its associated boarding facilities and that, as such, it owed the student a duty of care. The judge emphasised to the jury that the defendant "had obligations which it could not fulfil simply by appointing apparently competent people to do so on its behalf"[47] but that this did not imply that there was an absolute duty or guarantee to provide for the student's safety even from the assaults of the teacher. The judge described the duty as being one "to take reasonable steps to prevent her from being harmed, and it [the defendant] would be primarily liable only if it failed to take"[48] such reasonable care.

The judge viewed the actions of the headmaster as central to the duty to take reasonable care in that if he knew or should have known of the teacher's assaults on the student, he failed to take the necessary steps to prevent what happened. In this regard, the judge reminded the jury that there were suspicions, from early on in his appointment, concerning the teacher's inappropriate behavior, including his being observed watching female students in the showers, a complaint of his having kissed a student and touched the inside of another student's thigh, as well as expressions of concern to the headmaster about the teacher's behavior from nursing staff at the school. Of great concern was the fact that the student was missing from her dormitory one evening and was only located at 10:30 P.M. in the company of the teacher in a darkened staff room. Interestingly, the student's parents were not informed of this situation. In her summation of the importance of these events, Wilson J told the jury:

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[45] *Id.* at 1462.
[46] *Id.* at 1463.
[47] *Id.*
[48] *Id.*

> it's for you to decide whether [the teacher] did demonstrate inappropriate behaviour towards the female students – that's behaviour sufficiently untoward to be a warning sign – and it's for you to determine if he did, whether [the headmaster] knew or ought to have known about it and the adequacy of his response to it.[49]

In a crucial instruction, the judge advised the jury that if it thought that the teacher acted inappropriately and the headmaster knew or should have known about the behavior, there were two ways by which it could find the defendant responsible in negligence:

> If you find [the headmaster's] knowledge was, in fact, the defendant's knowledge, the knowledge of the Synod, and that the defendant should have taken proper precautions but didn't, then its omission to do so was negligent. That's the first way. The second way of looking at it is this: If you take the view, well, [the headmaster] was simply an employee of the Synod. You might find it was part of his job to report these matters to the Synod and to take proper precautions, and that he failed to do so, and in those circumstances, the defendant would be vicariously liable for his omission. The defendant, as his employer, would be responsible for his omission.[50]

The judge went on to discuss facts surrounding the headmaster's appointment and practices. In so doing, the judge noted that the headmaster was appointed by the archbishop-in-council, that he was responsible to a school council established by the defendant Synod, and that he had the authority to hire and fire staff. The judge instructed the jury:

> [Y]ou have to think, if [the headmaster], if his position was such that he was part of the governing mind or will of the defendant, then as a matter of law, his acts, his knowledge were the acts and knowledge of the defendant. On the other hand, if you conclude that he was so far down the chain of command that he wasn't part of this governing mind or will, but simply an employee, albeit one with a very responsible position as the headmaster of the school, then you couldn't conclude that because he knew or ought to have known something the defendant itself knew or ought to have known it . . . . Needless to say, you could conclude that he breached a duty

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[49] *Id.* at 1465.

[50] *Id.*

> of care which he owed and that the defendant, as his employer, is responsible for that breach [and that] [p]aedophiles act clandestinely. That's a fact of life. The defendant was obliged to have in place and police compliance with systems which took account of the possibility of there being a paedophile lurking about. It was not obliged to have systems which absolutely guaranteed the safety of the plaintiff. That may well have been an impossibility. But it was obliged to have systems which, in all the circumstances, would ensure that reasonable care was taken of her.[51]

The judge also charged the jury to consider evidence in relation to arguably inadequate responses by staff members, other than the teacher, to various circumstances. In relation to possible vicarious liability for the actions of the teacher, the judge said:

> [He] should be held responsible in law for what he did.... Clearly his conduct wasn't something he was authorised to do. What you have to consider is whether it was so closely connected with acts which he was authorised to do as to be within the scope of his employment.[52]

In addressing the assessment of general damages, Wilson J pointed out that the jury was entitled to consider the type of child the plaintiff was before the assaults and compare that with the type of adolescent and young adult she became.[53] In this regard the judge noted there was evidence linking sexual abuse with stress disorders and abuse of alcohol and marijuana as well as the ability to manage future relationships.

The judge next addressed the issue of exemplary damages by explaining that these are:

> sometimes called punitive damages. They're damages intended to punish a wrongdoer and to deter others from similar conduct. Mere disapproval of behaviour can't lead to an award of exemplary damages. There's got to be a lot more than that. What there has to be is your assessment of conduct amounting to conscious wrongdoing in a cruel and shameful disregard of the plaintiff's rights or amounting to such indifference towards her plight that it's deserving of punishment.[54]

The jury found for the student on all counts. First, the jury determined that school officials failed to take reasonable care of the plaintiff, who was harmed as a result. Second, the jury decided that the school was vicariously liable as its employees other than the accused teacher failed to take care of the plaintiff and she suffered harm as a consequence. Third, the jury held the defendant vicariously liable for the teacher's assaults. Finally, the jury reasoned that the school should be required to pay exemplary and general damages. In a very large award for a common law action by a former student against an Australian education authority, the jury awarded the plaintiff $843,800, of which $400,000 were for exemplary damages. It was subsequently announced that there will be no appeal.

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[51] *Id.* at 1466-67.

[52] *Id.* at 1469.

[53] *Id.* at 1473.

[54] *Id.* at 1481.

Conclusion

As in other common law countries, Australia is having to confront the fact that over past decades a considerable number of students, male and female, of varying ages, have been sexually assaulted by persons placed in positions of authority and trust over them. The cases discussed here indicate the vulnerability of students, regardless of their ages or backgrounds, to the predations of paedophiles and others who might work in educational settings. It is clear that all Australian jurisdictions are now taking legislative and administrative measures to try to ensure that appropriate systems are in place to protect students from the behavior of predatory, insensitive, or imprudent staff or others associated with the school. It is equally obvious that, increasingly, former and present students will look to the courts to seek redress for sexual abuse or other inappropriate contact.

The forthcoming decision of the High Court of Australia on the nondelegable duty of care and related issues has vast implications for schools and education authorities throughout the country. Thus, this judgment is awaited with considerable interest and anticipation by the education and legal professions as well as the general community.

11

ENGLAND AND WALES

REGULATING SCHOOL EDUCATION FOR SOCIAL INCLUSION

Neville Harris

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Introduction

A strong theme in the British Government's national education policy since 1997, when Tony Blair's first administration took office, has been an attempt to reduce levels of social exclusion, a concept described by the Prime Minister as "[a] short-hand label for what can happen when individuals or areas suffer from a combination of linked problems such as unemployment, poor skills, low incomes, poor housing, high crime environments, bad health and family breakdown."[1] Education strategies have been at the forefront of wider government policy initiatives to tackle a range of social problems such as youth crime, violence, weak parental responsibility, truancy, teenage pregnancy, and personal underachievement. These problems are not unique to the United Kingdom. Yet, what is perhaps special about the response of this country's government to these problems has been the scale of regulation imposed on the education system and, through various legal sanctions, on parents as well.[2]

Putting the current regulatory environment (elements of which are discussed later) into context, it must be understood that since the wholesale reforms of education in England and Wales in the 1980s and early 1990s, education policy has been almost entirely centrally driven. Power shifted markedly to central government during that period. Local education authorities (LEAs) in effect lost the "partnership" status they had previously enjoyed even though education remained a "national service, locally administered" as envisaged by the legislators of 1944. The Education Act of that year provided the legislative framework for state education throughout the country for four subsequent post-war decades, until the Conservative Party swept to power in 1979 under Margaret Thatcher and set about weakening local political control of schools and colleges. Schools and further education colleges were largely removed from LEA control over the ensuing years, but the means of achieving this and of ensuring that an institution's autonomy would be limited was a massive increase in central regulation. Schools, for example, gained managerial power over their own school budgets and LEAs lost control of the secular curriculum, but both financial management and curriculum delivery were closely regulated under the Education Reform Act 1988. Further, a rigorous new system of school and college inspection was introduced, with far-reaching regulatory and punitive powers in respect of failures in provision and management. A strict set of duties and prescribed procedures was introduced in respect of special educational needs.[3]

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[1] Cited in Secretary of State for Social Security, *Opportunity for All. Tackling poverty and social exclusion* (Command Paper No. Cm 4445) (London: The Stationery Office, 1999), p.23.

[2] This chapter focuses on England and Wales. In Scotland, education policy is the responsibility of the Scottish Executive, legislating (for primary legislation) via the Scottish Parliament. In the case of England and Wales, primary legislation on education is the responsibility of the Westminster Parliament, but secondary legislation is made for each jurisdiction separately—under the aegis of the Secretary of State for Education and Skills in England and the National Assembly for Wales in the case of Wales: *see further Halsbury's Laws of England* (London: Butterworths) Vol. 15(1) (2001 edition) paras 45, 46.

This regulatory tendency has continued under the post-1997 Labour governments, for example under the School Standards and Framework Act 1998[4] and the Learning and Skills Act 2000. The Special Educational Needs and Disability Act 2001 extends the Disability Discrimination Act 1995 to schools in addition to making significant amendments to the law of special educational needs. Further legislation, an Education Bill, is currently before Parliament. Despite enabling a limited number of schools to benefit from a degree of deregulation, the Bill increases regulation, for example in relation to independent (non-state) schools.[5] In 2001 there was a vast output of delegated legislation on education, in the form of over 100 statutory instruments covering a wide range of functional areas. The government claimed recently that "[n]o other education service in the world devolves as much power and responsibility to schools as we do,"[6] but the reality is that local power is rationed and reined in by the regulatory power of central government.

An indirect, and inherently beneficial, burden that has been placed on the education system by greater regulation has been a network of rights, some of which this author has discussed in previous editions of *The Yearbook of Education Law*, such as those concerned with parental choice of school. Until the Human Rights Act (HRA) 1998 incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into the law of the United Kingdom (UK), rights associated with education, including not only the right to education itself but also associated rights such as freedom of conscience, thought, and religion and the right not to be discriminated against, were derived exclusively from the duties imposed by the framework of regulation laid down principally in statute law and subordinate legislation. For example, the Secretary of State and LEAs have a long-standing duty to operate under the principle that children are to be educated according to their parents' wishes, provided that does not entail unreasonable public expenditure or inefficient provision.[7] Moreover, parents have enjoyed a separate right to withdraw their children from collective worship or religious education classes at school.[8] The incorporation of the ECHR came into effect on October 2, 2000, and some of the early litigation was considered in a previous paper.[9] To date, the HRA has not had a major impact in education: the existing rights and duties have largely stood up to HRA-based challenges in the courts, a contributing factor being judicial caution following this major constitutional reform. The real extension of social rights in the context of education in recent years has been, rather more, the product of new education and other social legislation.

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[3] *See* J. Robinson, "Special educational needs, the code and the new tribunal" (1996) 8(1) *Journal of Education and the Law* 39. N. Harris, *Special Educational Needs and Access to Justice* (Bristol, Jordans, 1997).

[4] *See* N. Harris, "Righting wrongs in education? The School Standards and Framework Act. 1998" (1998) 10(4) *Child and Family Law Quarterly* 395-410.

[5] See in particular clause 153, which empowers the making of regulations prescribing standards for a whole range of different matters, from the quality of education provided to the way that independent schools handle complaints.

[6] Secretary of State for Education and Employment, *Schools: Building on Success* (Command Paper Cm 5050) (2001), p.16.

[7] Education Act 1944, § 76; *see now* the Education Act 1996, § 9.

[8] School Standards and Framework Act 1998 § 71(1).

New Legislation and Procedures in Education

Antidiscrimination Laws

Over the past twelve months there have been key developments in relation to race and disability discrimination.

The Race Relations (Amendment) Act 2000

The 2000 Act was largely a response to the Stephen Lawrence Inquiry's findings[10] of institutional racism within public authorities and other organizations.[11] This Act amends the Race Relations Act 1976, adding further duties to current provisions which proscribe discrimination in the form of direct or indirect discrimination on the grounds of color, race, ethnic, or national origins or nationality in relation to admission to school; in respect of the benefits, facilities, or services offered; or in the exclusion of a person or subjecting them to any other detriment.[12] It also leaves in place the current duty under which LEAs must not discriminate in relation to any of their other functions under the Education Acts or in the provision of education and any ancillary benefits or services.[13] The amendments to the 1976 Act made by the 2000 Act were phased in between April 2001 and May 2002. A statutory code of practice reinforces the new statutory obligations. Changes affecting education (the 2000 Act applies to a wide range of public services) in particular are as follows.

First, it is unlawful for a public authority, in carrying out any of its functions, to commit an act which constitutes discrimination.[14] Bodies covered by this duty include the Office for Standards in Education (OFSTED), which is the agency responsible for organizing the routine inspection of schools and for monitoring and reporting on school standards, and the Learning and Skills Council, which is responsible for allocating funding for further education colleges. Second, every governing body of a school maintained by an LEA—the overwhelming majority of state schools—further education institution, and higher education institution must, in carrying out its functions, have due regard to the need (a) to eliminate unlawful racial discrimination, and (b) to promote equality of opportunity and good relations between persons of different racial groups.[15] The Secretary of State may, by order, impose on these or other persons or bodies[16] such duties as she considers appropriate for the purpose of ensuring the better performance by those persons of this duty.[17] This power has now been used and the Statutory Duties Order 2001[18] requires prescribed public bodies, including local authorities, to publish a race equality scheme and to operate ethnic monitoring of employed or prospective staff.

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[9] "Great Britain K-12," in Charles J. Russo (ed), *The Yearbook of Education Law 2001* (Dayton, ELA, 2001), pp. 433-455.

[10] Sir W. Macpherson, *The Stephen Lawrence Inquiry: Report* (Command Paper Cm 4262-I) (London, The Stationery Office, 1999).

[11] For details of the changes and the background to them, see Home Office, *Race Relations (Amendment) Act 2000. New Laws for a Successful Multi-Racial Britain, Proposals for Implementation* (February 2001) (www.homeoffice.gov.uk/raceact/welcome.htm).

[12] §§ 1, 3, 17.

[13] *Id.*, §§ 18, 19.

[14] *Id.*, new § 19B(1).

In the case of schools with 150 or more full-time staff, an LEA must monitor training, grievances, and disciplinary procedures. In addition, the Department for Education and Skills must undertake racial monitoring of teachers. The Order also imposes specific obligations on school governing bodies to prepare written statements of their policy for promoting race equality (a "race equality policy") and to assess and monitor the impact of the policy on pupils, parents, and staff of different racial groups. Particular emphasis is being placed on the impact of the race equality policy on the attainment levels of pupils. Unlike further and higher education institutions, there is no requirement for schools to publish the results of their monitoring.

Some of these activities have been undertaken on a non-statutory basis for a number of years. Even so, it was considered necessary to impose a range of mandatory requirements in order to reinforce the importance of promoting racial equality and provide further reassurance for racial minorities in the wake of the Macpherson report. The new responsibilities have assumed greater importance in the light of a government report, published as the provisions were being implemented, which indicated a widening racial inequality and continuing underachievement of pupils from particular ethnic minorities, notably those of Pakistani, Bangladeshi, and African-Caribbean origin.[19] The government's annual report for 2001 on progress towards reducing poverty and social exclusion expresses a determination "to build on progress and ensure that the participation and achievement of minority ethnic pupils matches that of the population as a whole."[20] Various initiatives aimed at tackling disadvantage are now in place.[21]

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[15] *Id.*, § 71(1) (as substituted).

[16] The Race Relations Act 1976 (General Statutory Duty) Order 2001 (S.I. 2001 No.3457) adds to the list of bodies subject to this duty, including the General Teaching Council for England and the General Teaching Council for Wales.

[17] *Id.*, § 71(2).

[18] The Race Relations Act 1976 (Statutory Duties) Order 2001 (S.I. 2001 No. 3458).

[19] Not published but reported in P. Wintour, "Racial Equality 'set to widen,'" *The Guardian*, August 7, 2001.

The Commission for Racial Equality (CRE) has been given a new power to issue codes of practice on the performance by public bodies of their duties.[22] Non-adherence to a code would not render a person liable to proceedings but would be admissible in evidence in legal actions and may be taken into account by a court.[23] Just one such statutory code has been issued: the *Code of Practice on the Duty to Promote Race Equality*.[24] In addition, the CRE has issued four non-statutory guides, one of which is intended specifically for schools.

The Special Educational Needs and Disability Act 2001

This Act is in two parts, one of which is relevant to disability discrimination; the other, concerned with special educational needs, is discussed later. Part 2 inserts new provisions into the Disability Discrimination Act 1995[25] that are to be phased in between 2002-05. The 1995 Act has hitherto been concerned primarily with eliminating disability discrimination in employment, so this extension of the law in the context of education is significant. The new provisions extend protection against disability discrimination to pupils or students in schools, further education colleges, and universities. These amendments to the law are based on the recommendations of the Disability Rights Task Force, first set up by the government in 1997. The Task Force's report, *From Exclusion to Inclusion*, was published in 1999. The timetable for implementation has been fairly generous in the case of schools, less so for further and higher education.

LEAs are given new duties for the preparation of accessibility strategies and plans aimed at increasing the participation of disabled pupils in the school curriculum; improving the physical environment of schools for use by disabled pupils; and improving, in ways which take account of their disabilities and any preferences expressed by their parents, the delivery of information to disabled pupils.[26] LEAs also have a residual duty, in relation to their functions under the Education Acts, not to discriminate against a disabled or prospective pupil.[27] Separate duties are placed on "responsible bodies," normally an LEA or governing body (depending upon whose function is being exercised), or the proprietor of an independent school. First, it is unlawful for a responsible body to discriminate against a disabled person in relation to admission to school, including the terms on which he or she is admitted or by refusing or deliberately omitting to accept the application.[28] Second, it is unlawful for a responsible body to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body[29] or in excluding the disabled pupil from the school or subjecting him or her to any other detriment.[30] The Government has indicated that further provision made via regulations will bring within the scope of these duties activities such as after-school clubs, school trips, and school orchestras.[31]

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[20] Secretary of State for Work and Pensions, *Opportunity for All – Making Progress: Third Annual Report 2001* (London, DWP, 2001), para 89.

[21] *See* N. Harris, "Exclusion-Inclusion: Tensions in Education Law and Policy" vol. 5(2) (2000/01) *Contemporary Issues in Law* 127-147.

[22] *I.e.*, their duties under § 71(1), (2): § 71C.

[23] § 71C(11).

[24] London, Commission for Racial Equality, 2002.

[25] 1995 Act, new §§ 28A-28X.

[26] *Id.*, §§ 28D and 28E.

[27] § 28F.

The Act not only proscribes particular forms of action but also requires officials from schools or LEAs to take positive or "anticipatory"[32] action. In particular, the responsible body will be under a duty to take reasonable steps to ensure that disabled persons are not placed at a disadvantage in relation to admission or availability of services as compared with non-disabled students; this does not extend to removing or altering a physical feature such as, for example, one arising from the design or construction of the school premises or the location of resources, or to providing auxiliary aids or services.[33] The kinds of steps which would be reasonably required may be specified in regulations and guided by a code of practice.[34] A breach of this duty constitutes unlawful disability discrimination if it is detrimental to the pupil and unjustified.[35] Less favorable treatment of a person is considered justified if it is the result of a permitted form of selection[36] or if "the reason for it is both material to the circumstances of the particular case and substantial."[37] Discrimination occurs where:

> for a reason relating to the person's disability, the body treats him less favourably than it treats or would treat others to whom that reason does not or would not apply, and it cannot show that the treatment in question is justified.[38]

There is a defense, in relation to a failure to take a particular step, of not knowing nor being reasonably expected to know that the person was disabled.[39]

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[28] *Id.*, § 28A(1).

[29] *Id.*, § 28A(2).

[30] *Id.*, § 28A(4).

[31] House of Lords, *Special Educational Needs and Disability Bill. Explanatory Notes* (London, Government publications on the internet, 2000), para 75.

[32] *Id.*, para 78.

[33] Disability Discrimination Act 1995, § 28C.

[34] *Id.*, § 28C(3), (4).

[35] *Id.*, § 28B(2).

[36] *Id.*, § 28B(6).

[37] *Id.*, § 28B(7).

[38] *Id.*, § 28B(1).

[39] *Id.*, § 28B(3).

Clearly, these provisions could give rise to uncertainty on the part of governing bodies seeking to ensure compliance with these potentially onerous responsibilities. Further, the relatively wide scope for interpretation suggests that disputes between parents and schools will be commonplace. The code of practice to be issued by the Disability Rights Commission will doubtless contain guidance on the informal resolution of disputes, but the Act anticipates ongoing disagreement by its provision of formal mechanisms if matters cannot be resolved in this way.

Complaints of discrimination in relation to special education are to be brought to the Special Educational Needs and Disability Tribunal (SENDIST), not via civil (or court) proceedings.[40] The tribunal, comprised (in disability discrimination cases) of a lawyer and, it is expected, two others with experience relating to disability, will be able to make an order remedying or ameliorating a disadvantage, but will not have the power to award monetary compensation.[41] Appeals from the SENDIST will lie to the High Court.[42] The SENDIST will not have jurisdiction over disability discrimination complaints arising in the context of admissions or permanent exclusion from state schools;[43] however, complaints arising out of temporary exclusion from school, or admission to or permanent exclusion from independent schools, will fall within its remit.[44] These anomalies in jurisdiction over different types of exclusion are not easy to rationalize but stem in part from the government's continuing commitment to maintain separate, independent appeal panels (generally chaired by a layperson) for cases of permanent exclusion from state schools. As a complaint of discrimination could form part of an appeal against permanent exclusion, it would not make sense for parallel actions to be brought. Perhaps a better solution would have been to transfer exclusion appeals to the more judicial SENDIST.[45]

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[40] *Id.*, §§ 28H, 28I and 28J. The tribunal, previously named the Special Educational Needs Tribunal, also hears appeals concerning special educational needs decisions when it is chaired by a lawyer and the other two members have experience of special educational needs.

[41] Disability Discrimination Act 1995, §§ 28I(3), (4), when in force. Examples of the kinds of orders the Government envisages the SENDIST making are given in the *Special Educational Needs and Disability Bill. Explanatory Notes* (London, The Stationery Office, 2001), para. 89.

[42] Amendments made to the Tribunals and Inquiries Act 1992 § 11(1) and Schedule 1 by the 2001 Act Schedule 8 paras 19-22, when in force.

[43] *See* Disability Discrimination Act 1995, § 28I(2). These matters will instead fall within the jurisdiction of the relevant appeal body (school admissions appeal panels or independent appeal panels for school exclusion cases) under the School Standards and Framework Act 1998.

[44] Complaints against LEAs, which also have new non-discrimination duties: see Disability Discrimination Act 1995 §§ 28D-28F, will also lie to the SENDIST.

[45] The case for this is argued in N. Harris and K. Eden, with A. Blair, *Challenges to School Exclusion* (London, Routledge Falmer, 2000).

Inclusion and Special Educational Needs

The principle of inclusion or integration of pupils with special educational needs (learning difficulties) long predates the current government's inclusion agenda but now sits comfortably within it. The idea that children with special educational needs should normally be integrated into mainstream education was first translated into a statutory obligation under the Education Act 1981, the first comprehensive statutory regime on special education in England and Wales, and continued under the Education Act 1993, subsequently consolidated into the Education Act 1996.[46] Most children with special educational needs must now be educated in mainstream settings as opposed to "special" schools and classes.[47] As the new code of practice on special educational needs that was introduced in January 2002 states, "All teachers are teachers of children with special educational needs."[48]

In 2000, only 3 percent of pupils with a statutory statement, a document recording their special needs and the required provision to meet them[49] and not unlike Individualized Education Programs in the United States, were placed in independent schools.[50] Of the others, 60 percent were in mainstream schools, up from 54 percent in 1995, and 37 percent in special schools or Pupil Referral Units.[51] Yet, the proportion of the total school population attending special schools has only declined slowly, from 1.22 percent in 1995 to 1.16 percent in 2000,[52] and in the light of this and its commitment to broaden inclusiveness within the education system, the government has sought to strengthen the preexisting duty on LEAs to educate a child with special educational needs in a mainstream school, alongside children who do not have such needs. While there is no guarantee of mainstream education for those who would prefer it,[53] because schools do not always have the additional resources required for inclusion, such a placement is now more likely than in the past.

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[46] § 316.

[47] Note the preexisting duty on those making special educational provision to "secure... that the child engages in the activities of the school together with children who do not have special educational needs" (Education Act 1996, § 317(4)).

[48] Department for Education and Skills, *Special Educational Needs Code of Practice* (London, Department for Education and Skills, 2001), para 5.2, replacing the *Code of Practice for the Identification and Assessment of Special Educational Needs* (London, Department for Education, 1994). LEAs, schools, and the SENDIST are under a duty to have regard to the provisions of the code when exercising their respective statutory functions in relation to special educational needs: Education Act 1996, §313(2), (3).

[49] A child with special educational needs (as defined in § 312 of the 1996 Act) need only be provided with a statement if officials at a LEA consider it "necessary" to determine the special educational provision the child's learning difficulty calls for: § 324(1). In cases where a child's needs can be met out of the school's own resources, a statement will not be considered necessary. If additional resources are necessary to meet the child's needs, a statement will generally be made.

[50] Department for Education and Employment, *Statistics of Education: Special Educational Needs in England* (London, DfEE, 2000), p.3.

[51] *Id.*

[52] *Id.*, Table 12.

The way that the Special Education Needs and Disability Act 2001 has strengthened the inclusion duty is by removing some of the exclusions to it. Indeed, for the overwhelming majority, 97 percent of children with special educational needs who do not have statements, the duty to educate in a mainstream setting is now unconditional.[54] For children with statements, there are still exclusions: there is a duty to educate a child with a statement of special educational needs in a mainstream school and normally alongside children who do not have such needs, *unless* that would be incompatible with the wishes of his or her parent or with the provision of efficient education for other children.[55]

The 2001 Act also makes changes[56] designed to ensure that arrangements are made to avoid disputes, that parents are given advice and information about matters relating to their child's special educational needs and about provisions made for a non-statemented child, that LEAs comply within a prescribed period with orders made by the SENDIST following an appeal, and that LEAs provide for reviews or assessments of a child's needs at the request of the head teacher of the school. Other, more technical, changes are made to current procedures and requirements.

Overall, the 2001 Act increases still further the scale and detail of the regulation surrounding special educational needs. The legalism pervading this field has, moreover, been enhanced or exacerbated, depending on one's point of view, by the scale of judicial activism resulting from the right of further appeal from the SENDIST to the High Court. Despite the fact that the courts' supervisory role over public authorities ensures that applications for judicial review of education decisions are frequent and result in many judgments, special educational needs is the only field of education where there is a direct appeal route (although only on a point of law) to the court. By the end of 2001 there had been 258 such appeals, 86 of which came to judgment,[57] resulting in a substantial body of jurisprudence on special educational needs with which LEAs, schools, and the SENDIST have to contend in their respective roles. The legislation itself is seen as partly to blame since it gives so much scope for discretion and judgment by decision makers. The president of the SENDIST has expressed concern that the courts' involvement in this field has engendered greater uncertainty for decision makers, and he has called for a tightening up of the legislation that they have to apply.[58]

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[53] As noted by R. Rieser, "Special Educational Needs or Inclusive Education. The challenge of disability discrimination in schooling," in M. Cole (ed), *Education, Equality and Human Rights* (London: Routledge/Falmer, 2000) 141-161 at p.147.

[54] Education Act 1996, § 316(1), (2), as substituted by the 2001 Act, § 1. Prior to January 2002 the duty in § 316 of the 1996 Act was to ensure that a child (whether or not statemented) was educated in a school which was not a special school unless (a) that school was incompatible with the wishes of his parent, or (b) educating the child in a non-special school would not be compatible with (i) his receiving the special provision his needs call for, (ii) the provision of efficient education for other children who attend, and (iii) the efficient use of resources. In effect, the 2001 Act has removed: in the case of unstatemented children, all of these conditions; and in the case of children with statements, (b)(i) and (iii).

[55] Education Act 1996, § 316(3), as substituted by the 2001 Act, § 1. The position prior to the 2001 Act is set out in note 54 *infra*. An authority may only rely on this incompatibility if it can show that there were no reasonable steps it or another authority could take to prevent it: § 316A(6).

[56] All in Part 1 of the 2001 Act.

The Sanction of Exclusion

The government has been keen to reduce levels of exclusion from school. It used the new power in the School Standards and Framework Act 1998, enabling it to prescribe guidance on exclusion which schools, LEAs, and appeal panels must take into account, to discourage the exclusion of pupils unless all other attempts to deal with their misbehavior had failed.[59] In 2001, however, the government abandoned its official national target for a reduction in exclusions from schools by one-third by 2002, which is perhaps just as well, because figures released in May 2002 showed that the total number of permanent exclusions from schools in England rose in 2000-01, from 8,323 the previous year to 9,210, after a succession of annual decreases dating back to 1996-97, when the exclusion rate was at its peak of 12,665 cases.[60] One of the reasons for the reversal of the trend was the revision of the official guidance following complaints from teachers' organizations about increases in violent and abusive behavior by pupils who were often regarded as protected from exclusion because the guidance seemingly discouraged it. Recently published draft amendments to the guidance continue its liberalization so far as exclusion for violent or abusive conduct is concerned, with particular toleration of this sanction in cases involving offensive weapons or bullying.

A particular concern that has arisen in relation to the guidance is that it might be compromising the independent role and authority of appeal panels.[61] Indeed, a legal challenge to it was brought on that basis recently, but Justice Scott Baker held that the guidance was not as prescriptive as had been suggested:

> [P]anels are being told they must have regard to a number of other factors quite apart from the Secretary of State's view that reinstatement is normally inappropriate in cases involving serious

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[57] Figures quoted in T. Aldridge QC (President), *Special Educational Needs Tribunal Annual Report 2000-2001* (London, Special Educational Needs Tribunal, 2001), p.12.

[58] *Id.*, pp. 13-14.

[59] § 68; Department for Education and Employment, Circular 10/99, *Social Inclusion: Pupil Support* (London, DfEE, 1999). The power to exclude is in § 64.

[60] Figures from Department for Education and Skills, *Permanent Exclusions from Maintained Schools and Exclusion Appeals, England* (London, DfES, 2002) and earlier annual statistics.

[61] See the editorial in *Education Law Journal*, vol. 3 (2002) issue 1.

> violence. At the end of the day, panels still have to exercise their judgment in every case.... [62]

Also in this case, Scott Baker J confirmed that exclusion appeal hearings are not covered by the "fair and impartial hearing" requirement in Article 6 of the ECHR, following a High Court decision last year to that effect,[63] although a decision by the Court of Appeal in that case is pending. It should be stressed that there is, nevertheless, an entitlement to a fair hearing under common law (the rules of natural justice).

One of the barriers to inclusion arises from the failure to reintegrate pupils excluded from school into mainstream education. There have been a number of recent challenges arising from the arrangements made for the education of excluded pupils. Two particular problems have arisen. First, some pupils have been reinstated by appeal panels but teachers have refused to teach them when they have returned to school. In two cases judicial review was sought against schools where head teachers refused to re-admit excluded children to mainstream classes due to threatened boycotts by teachers.[64] The key question was whether reinstatement, as ordered by the appeal panel when overturning the exclusion, necessarily required the child to be re-admitted to his normal mainstream class.

In each case the court could find no illegality in the education of the child in school but away from their normal classmates, under special arrangements. In July 2001, the Court of Appeal rejected appeals against these two decisions.[65] One of the three appeal court judges, Lord Justice Laws, stated that in such cases the head teacher and governing body are required to act proportionately to the threat of industrial action. They should "consider what is the least derogation from the pupil's full integration into the school that must be conceded so as to secure the protection of the other pupils' interests."[66] This dictum was applied in a recent case where an appeal panel ordered the reinstatement of a fourteen-year-old pupil who had been excluded following a verbal assault.[67] Faced with the threat of industrial action from staff who were opposed to the decision to reinstate, the head teacher wrote to the parents saying that in the circumstances he could not guarantee the boy's safety. The boy's father felt he had no option but to withdraw the boy from school. Hooper J said that the head teacher's action was "manifestly unreasonable and disproportionate" and was nowhere near satisfying Laws LJ's "least derogation" principle.[68]

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[62] S (The Queen, on the application of) v. London Borough of Brent and others [2002] E.L.R. 57 at para 42.

[63] B (The Queen, on the application of) v. Head Teacher of Alperton Cmty. Sch. and Others; T (The Queen, on the application of) v. Head Teacher of Wembley High Sch. and Others; C (The Queen, on the application of) v. The Governing Body of Cardinal Newman High Sch. and Others [2001] E.L.R. 359.

[64] L (The Queen, on the application of) v. The Governors of J Sch. [2001] ELR 411 and C (The Queen, on the application of) v. Governors of B Sch. [2001] ELR 285.

[65] W (The Queen, on the application of) v. The Governors of B Sch.; L (The Queen, on the application of) v. The Governors of J Sch. [2002] E.L.R. 105, CA.

[66] *Id.* at para 29.

[67] A (The Queen, on the application of) v. Head Teacher of P School, The Governors of P Sch. and the City and County of Swansea [2002] E.L.R. 244.

The situation in a fourth case was slightly different since it involved an action against the teachers' union itself. The grounds alleged that the union members' choice not to teach the child as normal was unlawful under trades union law because it was not in furtherance of a trade dispute for the purposes of the relevant statute.[69] The Court of Appeal ruled that the working conditions of the teachers were in dispute for this purpose. In addition, the court rejected arguments based on the defects in the balloting process leading to the decision to take industrial action.

A second problem is that some pupils have not been reinstated but have been provided with alternative provision under the duty to make suitable arrangements for them. The Education Act 1996 requires each LEA to "make arrangements for the provision of suitable full-time or part-time education at school or otherwise than at school" for excluded pupils who are of compulsory school age (i.e., aged 5-15 inclusive).[70] Some excluded pupils receive home tuition, but many others, around 50 percent of those who are excluded, are accommodated in Pupil Referral Units (PRUs), as opposed to schools, and the government has also provided resources for Learning Support Units (LSUs) in schools; there are currently around 1,000 LSUs. In any event, the statutory duty is not always met.

The draft-revised guidance on exclusions refers to the government's commitment to ensure that by September 2002, all pupils excluded for fifteen consecutive school days will receive full-time and appropriate education while excluded.[71] This is welcome, but the apparent assumption that part-time education for a child who should ideally be at school is "suitable" remains questionable. The courts have, in fact, adopted a fairly generous interpretation of the duty despite arguments that part-time education might constitute a denial of the right to education under Article 2 of the First Protocol to the ECHR or, in the case of an excluded child provided with home tuition, might give rise to a breach of Article 8, which addresses the right to privacy and family life, by depriving such a student of a "suitable" education, including the proper development of his or her personality, by educating him or her separately from others. Recently, the latter argument was used, but rejected by the court, in a case where a child aged twelve was excluded from school and received just ten hours per week of home tuition.[72]

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[68] *Id.*, at para 40.

[69] The Trades Union and Labour Relations Act (Consolidation) Act 1992, § 232A.

[70] § 19.

[71] Department for Education and Skills, *Revised Guidance on Exclusion from School—Draft for Consultation* (London, DfES, 2002), para 6.7.

[72] T (The Queen, on the application of), *supra* note 63.

In two other recent cases the courts were unwilling to consider in-depth the quality of the education provided to, or proposed for, a pupil at a PRU. In the first, a pupil's parents declined an offer that she attend the unit because they considered it unsuitable.[73] The court found that there was sufficient material evidence to support the LEA's view that provision in the unit was suitable. In the second, the young person who was excluded for fighting was receiving only eight hours of teaching per week at the unit but there was evidence of confrontation between her and others at the unit that might have hindered the unit's plan to increase progressively the provision made with a view to her eventual reintegration into full-time mainstream education.[74] The court decided that the LEA was doing all it could, and in the circumstances that was sufficient to satisfy the requirements of the statute.

Truancy

Reducing truancy is another goal linked to the social inclusion initiative to be underpinned by significant regulatory provision.[75] The government has reported that every school day around 50,000 children of compulsory school age are absent from school without justifiable reason. Truancy and exclusion are associated with educational underachievement, criminality, and various other social problems.[76] A range of measures is already in place to reinforce the long-standing duty on parents, bolstered by criminal law sanctions, to ensure that their children receive an efficient full-time education and, if on the register at a school, attend regularly.[77] Since 1998 there has been a power to require governing bodies of LEA-maintained schools to set targets for reductions in truancy from their schools.[78] Further, under the Crime and Disorder Act 1998[79] an authorized police officer may take a child or young person he or she reasonably believes to be truanting to school or to designated premises. The latest strategy to be announced by the government involves the placement of 100 police officers in or around schools in ten identified crime areas by Autumn 2002, as part of Safer Schools Partnerships.

Sadly, much truancy in England and Wales is condoned by parents. The government has recently asserted that some 80 percent of truants are discovered with their parents. Moves have already been made to force parents to face up to their legal responsibilities. The Crime and Disorder Act 1998[80] empowers a court, in an area in which appropriate arrangements have been introduced, to make a "parenting order" when convicting a parent or guardian of an offence involving non-attendance at school under the Education Act 1996. The Criminal Justice and Court Services Act 2000 has increased to a £2,500 fine (in excess of $3,700) and/or three months' imprisonment, the maximum punishment that may be imposed by a court where parents are aware that their child is not attending school regularly. In May 2002, Oxfordshire magistrates imprisoned a forty-three-year-old woman for sixty days under this power, following her persistent failure to comply with earlier orders, although the sentence was later reduced on appeal. The woman made legal history by being the first person to be imprisoned under this power.

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[73] S (The Queen, on the application of) v. Head Teacher of C High School and Others [2002] E.L.R. 73.

[74] N (The Queen, on the application of) v. The Head Teacher of X Sch. and Others [2002] E.L.R. 187.

[75] See the report by the government's Social Exclusion Unit, *Truancy and School Exclusion* (Command Paper Cm 3957) (London, The Stationery Office, 1998).

[76] *Id.*

[77] Education Act 1966, §§ 443 and 444.

[78] The School Standards and Framework Act 1998, § 63; the Education (School Attendance Targets) Regulations 1999 (S.I. 1999/137, as amended) and the Education (School Performance and Unauthorised Absence Targets) (Wales) Regulations 1999 (S.I. 1999/1811).

[79] § 16.

The latest proposal, said by the Prime Minister to be under active consideration,[81] but criticized by anti-poverty groups, involves the reduction or suspension of a welfare payment, specifically child benefit, in cases of persistent school absenteeism. Such a sanction was introduced in France some years ago and seems to parallel Wisconsin's Learnfare program which made it a condition for a parent's receipt of Aid for Families with Dependent Children that their child attended regularly at school; if the condition was not met in any month, the next month's support would be withheld. The government also wants to discourage school officials from giving permission too readily for pupils to be absent for family holidays and other authorized reasons. The Education Bill currently before Parliament would extend the current target-setting power to authorized absences as well as those which are unauthorized.

Regulation: Reversing the Trend?

There is now a widespread feeling within the education system that the scale of regulation has become detrimental to the government's overall aims of raising standards and "ensuring that all our children get a high quality education."[82] Teachers complain vociferously about the amount of bureaucracy that is now seen as distracting them from the core activity of teaching. In June 2002, the *Times Educational Supplement* reported on a "secret" government dossier, based on a survey of forty schools, revealing "82 ways in which teachers are now being strangled by red tape."[83] Shortly after the 1997 general election that brought Labour to power, a government education policy document promised that the new administration would "give teachers time to focus on the important task of raising standards" by rooting out any unnecessary bureaucracy.[84] This was followed by guidance by the Department for Education and Employment, now the Department for Education and Skills, and plans for streamlining the school inspection process. The problem has not gone away. In 2001, another policy statement talked of "restricting needless bureaucratic burdens (including those associated with the inspection process)" and proclaimed that the government had "reduced paperwork for teachers—cutting by a third the number of documents we sent to schools this year."[85]

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[80] § 8.

[81] *Hansard*, House of Commons, 1 May 2002, col. 940.

[82] Policy goal, as set out in *Opportunity for All*, *supra* note 1, at p. 45.

[83] "Ministers face up to red tape defeat," *The Times Educational Supplement* (internet) (www.tes.co.uk/this_weeks_edition/news) (June 14, 2002).

A new strategy about to be unleashed on the education system involves the use of regulation not so much as a stick with which to keep educational institutions and the teaching profession firmly on-message, but rather as a carrot of rewards for greater effectiveness and efficiency. It will work by enabling schools identified as highly successful, in terms of qualities such as management efficiency, effective leadership, and educational achievement, to be permitted to operate under a more liberal regime in relation to certain core areas of activity. The promise of reduced regulation will act as an incentive to success:

> We have already changed the inspection arrangements so that successful schools receive a 'short' or light-touch inspection which places much greater emphasis on school self-evaluation. The early evidence suggests that this approach is working extremely well. We want now to extend their autonomy by offering greater freedom over the curriculum and over pay and conditions, as we did for Education Action Zones in the 1998 legislation.[86] It will be entirely a matter for the schools concerned to decide whether to take advantage of the greater flexibility. The strong message we want to convey is that successful schools should, increasingly, be able to manage their own affairs. Minimum national standards will be respected. Schools need to have demonstrated continuous improvement or sustained excellence.[87]

Provision for this liberalization incentive is made in the current Education Bill which was published in late 2001 and is expected to be enacted in July 2002, although, as with most primary legislation in the UK, it will be implemented incrementally. Under the Bill, a "qualifying body" [88] such as the governing body of a "qualifying school" will be able to apply to the Secretary of State for Education and Skills or to the National Assembly in Wales for an order conferring "exemption from any requirement imposed by education legislation" or "relaxing any such requirement in its application to the applicant." The order could also permit the applicant to exercise a function conferred by education legislation on a different body or modify the legislation in its application to the applicant, consequential upon the exemption, relaxation, or permission granted by the order.[89] The order will specify the period during which the exemption or relaxation, etc. would apply, but it may not exceed an initial period of three years. The order may be varied and it may be extended once only by a period of up to three further years. The power to make an order is time limited. It will run for four years from the commencement date of the relevant section of the new Act.

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[84] Secretary of State for Education and Employment, *Excellence in Schools* (Command Paper Cm 3681) (The Stationery Office, 1997), Chapter 5 para 30.

[85] *Supra* note 6, pp 7, 13. A 40 percent cut in documents sent to primary schools was also reported.

[86] These zones are established under Part I of the School Standards and Framework Act 1998: *see* Charles J. Russo (ed.), *The Yearbook of Education Law 1999* (Dayton, ELA, 1999), at p. 437.

[87] *Supra* note 6, p.50.

[88] The definition includes an LEA, a governing body of a school in the state sector, or an approved independent special school: clause 1(3).

A school will only be eligible to apply as a "qualifying school" if it meets the prescribed criteria, not yet framed in law, relating to "the performance of, or the quality of leadership in, the school."[90] In relation to schools only, further provision may be made by the Secretary of State or National Assembly in Wales in relation to the scope of orders made under the new power. In particular, regulations may designate legislative provisions on the curriculum or on pay and conditions of staff as attracting exemption or modification as of right or discretionary exemption. This could mean, for example, that a particular school's teachers may be freed from some or all of the many statutory requirements currently regulating the content of education under the National Curriculum, religious education or sex education, although such exemption would not be lawful if it conflicted with the human rights specified in the HRA 1998.[91] Alternatively, or additionally, the teachers could be employed under terms or conditions that differed from the national terms and conditions currently prescribed by law.[92]

Currently, the only substantive power to modify curricular requirements is on a national basis rather than for an individual school,[93] and only a limited power exists to employ teachers on different conditions in education action zones.[94] The creation of the new power therefore constitutes a very significant reform. It might, on the face of it, seem rather strange to reward particularly good schools by freeing them from some of the statutory requirements. It could be argued that the general regulatory framework has contributed to, or at least not undermined, these schools' success. Moreover, if the strict legal framework is not necessary, then why should it not be at least partly dismantled for all schools? The government argues that a greater scope to innovate, particularly in the area of the curriculum, should only be entrusted to the schools which have proved their effectiveness: "[w]here schools have demonstrated that they are well led and managed and are achieving high standards, they have shown that they make effective use of their autonomy."[95] The education system as a whole, it seems to be envisaged, will benefit from the experience of such local curricular innovation, while the reward of greater freedom will operate *pour encourager les autres*, promoting increased effectiveness and higher standards in remaining schools. Parents of pupils in the favored schools might, however, be concerned that this, albeit limited, liberalization will weaken the quality safeguards. But the government has stressed that in these schools "the framework of performance targets and accountability will remain in place."[96]

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[89] Clause 2(1).

[90] Clause 5(1).

[91] *See supra* note 9.

[92] Under the School Teachers' Pay and Conditions Act 1991 and Education (School Teachers' Pay and Conditions) Orders.

[93] School Standards and Framework Act 1998, § 363. The head teacher also has a power to grant *temporary* exemption from the National Curriculum for an individual pupil: *Id.* § 365. Also, the National Curriculum may be dis-applied or modified in the case of a pupil with a statement of special educational needs: Id., § 364.

[94] School Standards and Framework Act 1998, § 13.

Perhaps the most problematic aspect of regulation for schools, teachers, and local administrators in England and Wales over the past couple of decades has been the pace of change, involving almost constant reform. The Education Bill is around one-third longer again than the very substantial School Standards and Framework Act 1998. Frankly, education law in England and Wales is in something of a mess, with the benefits of the incorporation of preexisting education legislation into consolidating statutes (the Education Act 1996 and School Inspection Act 1996) being progressively eroded.

The government seems at last to be cognizant of these problems, but the proposed solution involves only limited consolidation or simplification in the area of the Secretary of State's grant-making powers. In order to "modernise" education law, the government plans via the Education Bill to "reduce the level of detail in the Education Acts,"[97] making it easier for schools to implement new practices and helping to "cut down the amount of effort needed on all sides to achieve change."[98] This is really another side of the coin of deregulation represented by the exemption reforms noted earlier, although it should be stressed that the "sides" referred to here also include the government itself and Parliament. The government argues that current education statute law is too prescriptive—far more so, it says, than many other areas of the law,[99] so that even minor legislative change requires further primary legislation, potentially involving considerable Parliamentary time. Cynics might argue that what the government is really trying to do is to smooth the path of reform by removing many of the obstacles presented by the scrutiny involved in standard Parliamentary procedure. The replacement of hard legislation by "soft law," evident in the plans to replace much of current legislation on the processes of school government with mere "statutory guidance,"[100] also signifies a new trend in education law in England and Wales.

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[95] Department for Education and Skills, *Education Bill 2001. A Summary* (DfES, 2001), para 3.5.

[96] *Id.*, para 3.6.

[97] *Id.*, para 4.2.

[98] *Id.*

[99] Secretary of State for Education and Skills, *Schools: Achieving Success* (London, DfES, 2001), Part 9, available at www.dfes.gov.uk/achievingsuccess/.

Conclusion

The post-1997 Labour government's policy emphasis on improved social inclusiveness does distinguish it from its Conservative predecessors, but it has donned the same mantle of regulatory control. The constant change to the statutory framework in England and Wales, which showed no let up in 2001, has added layers of regulation that many teachers, head teachers and school governors regard as having hindered the core business of schools. The government has recognized this to a certain degree, but refuses to be swayed from the achievement of its wider objectives, which it considers to justify close central direction of the education system. Those objectives expressly include raised educational standards for the benefit of all and greater inclusiveness in education for traditionally disadvantaged groups. The social and economic importance of their achievement is perceived as warranting a high degree of regulation.

Yet, there is a fine balance to be achieved. Faced with low teacher morale and continuing recruitment or retention problems, in relation to which the burden of regulation and accompanying bureaucracy are known to be contributory factors, the government must be careful to leave room for an initiative which is conducive to professional esteem. The current solution, namely a targeted deregulation as a reward for specific high-achieving schools, in part to facilitate innovation, may be clever, but that does not make it wise. It runs the risk of division which could ultimately exacerbate rather than ameliorate some of the current problems. It will also add to the overall complexity of the education system and its legal framework which, in itself, will inevitably place management, rather more than pedagogy, to the fore.

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[100] Department for Education and Skills, *Education Bill 2001. A Summary* (London, DfES, 2001), para 4.3.

11

HIGHER EDUCATION IN GREAT BRITAIN

Dennis J. Farrington

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Introduction

This chapter is an update on the legal issues which are currently engaging the attention of university and college administrators in Great Britain. Following the coming into force of many provisions of legislation enacted in 2000, particularly the Human Rights Act (HRA) and the Regulation of Investigatory Powers Acts (RIPA), attention is focused on the apparent incompatibility between HRA and secondary RIPA legislation in relation to interception of email and telephone traffic. The legislation is typically complex and is of particular interest to higher educators as the power of employers to intercept emails could potentially be misused to attack individual academic freedom. At the time of writing there has been no litigation on this topic.

The Scottish Parliament continues to debate a Freedom of Information Bill while the United Kingdom (UK) Act is being brought into force from 2004. Institutions are planning on how to adjust to the new requirements on access to information and how they may adequately protect personal and commercially sensitive data which are exempt from disclosure under the new law. For administrators this means, among other things, redesigning the format of papers and reports so that exempt information is kept separately.

This chapter looks at the effects of UK legislation as well as English and European case law on higher education. 2001 was a relatively quiet year; however, some interesting points emerged from litigation. Some were complex questions of interpretation of statutes which have a European context (as in indirect taxation and employment protection). Others illustrate the unsuitability of the courts for dealing with individual disputes between members of a higher education institution and the necessity to complete the overhaul of the system of dispute resolution begun in 1997. Remaining issues simply illustrate bureaucratic muddle and a tendency to rush into litigation.

Accreditation Issues

There is no national "accreditation" system as such in the UK. All existing institutions are required to cooperate with the Quality Assurance Agency (QAA) as a condition of receiving support from public funds but the processes and procedures of the QAA have been subject to major review and change during 2001. Any new institution, or one which does not yet have degree-awarding powers and wishes to gain them, is subject to a rigorous process of evaluation by the QAA and scrutiny by other agencies, the end-product of which is a recommendation to the Privy Council. Similarly, a non-university institution which wishes to apply for a university title has to jump several hurdles; one completed the course in 2001 to become the new University of Gloucestershire.

Courses leading directly to professional qualifications, or exemption from part of the qualifying process such as in accountancy or social work, are subject to accreditation by the appropriate professional body. In addition, teacher training courses in England are subject to accreditation by the Teacher Training Agency (TTA). In 2001, the first legal challenge was mounted to withdrawal of institutional accreditation by the TTA. The University of Exeter sought judicial review of withdrawal and of a second decision to reduce allocations of trainee numbers. University officials asserted that the TTA had taken into account irrelevant considerations, had not followed its published procedures, had muddled issues of accreditation and allocation, had fettered its discretion and acted irrationally. This broadside attack failed, the court rejecting all these propositions. Yet, it became clear in the course of the hearing that there had been some confusion and error in correspondence from the TTA and that a full explanation was not given until a few weeks before the court hearing. Costs were therefore confined to the period since the explanation was given.[1]

Dispute Resolution

During the year, a lengthy consultation process resulted in many, but by no means all, institutions agreeing to adopt a new, independent system for resolution of disputes with students. Essentially, this enables disputes which cannot be resolved internally to be referred to an independent person or panel, probably to be called "ombudsman" in England, not necessarily a lawyer or lawyers. Scottish institutions decided, by contrast, that the independent person should be appointed by the Faculty of Advocates, that branch of the legal profession with the right of appearance in the higher courts. No agreement has yet been reached on resolution of those disputes with staff which fall outside statutory employment protection. The medieval Visitorial system described in the last issue of the *Yearbook*, confined to older universities and most colleges of Oxford and Cambridge (but not those universities themselves) continues to attract some institutional support and is still in place. The courts have had no choice but to confirm its existence in 2001; *R v. University of Essex ex p McPherson*[2] was an unsuccessful attempt to challenge it. Its continued existence in the twenty-first century is regularly challenged by commentators.

On the other hand, many newer institutions face a legal obstacle in that as statutory bodies they cannot, without express authority, delegate any decision-making powers to a third party. It seems to be the case that in legal jurisdictions and both old and new sectors the independent person or panel will only be called upon to make "recommendations." Failure to adopt the recommendations of course might result in a court challenge, as indeed might the recommendations themselves if a litigant is determined to get her or his day in court. Even so, it is probable that the realization of the system of external review will reduce the frequency of court hearings.

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[1] R v. The Teacher Training Agency *ex p* University of Exeter [2001] EHWC Admin 264.

[2] (unrep) QBD 23 March 2001.

Student Cases in Domestic Law

The Yearbook of Education Law 2001 reported on *R v. University of Cambridge ex p Persaud.*[3] Readers may recall that the English High Court refused to order the University of Cambridge to disclose reports which were instrumental to a decision to terminate Persaud's Ph.D. studies. The Court held that the case concerned essentially academic judgment, in which unquestionably the judiciary does not interfere. On appeal, Persaud argued that the question for the court was not about academic judgment as such, it was whether in a decision-making process which had such profound effects on her, it was open to university officials to assert that the requirements of fairness started and ended with allowing her to make representations as to why her studies should not be terminated.

The Court of Appeal, allowing the appeal in part, held that the University's Board of Graduate Studies had not acted fairly toward Persaud when rejecting her application for reinstatement. The Court noted that officials had not given Persaud an opportunity to clarify issues relating to her attendance at a laboratory, which was one of three key elements which it had been agreed would be reviewed; it had not given Persaud an opportunity to raise any question about the partiality or competence of the unidentified senior member of the Faculty who provided an opinion; the unidentified senior academic had put in question a matter of which Persaud had never been given warning, whether her research subject had potential to merit the award of Ph.D. The Court observed that this was not, on a true analysis, a challenge to academic judgment; it was a challenge to a process which failed to measure up to the standard of fairness required of the university. While the relevant decisions of the Board were quashed, the Court did not issue an order of mandamus which would have required university officials to reconsider the matter. Moreover, Persaud was no longer engaged in the approved course of research for which she was registered as a Ph.D. student. She was now engaged on a different course of research at the University of Oxford. If the Board were to be asked to reconsider whether to reinstate her graduate status, it would have to refuse to do so since she was no longer pursuing the course for which she was registered.

The case illustrates three things. First, the inability of the court system to deal quickly with matters of such extraordinary importance to the individual. Second, that not even one of the most distinguished universities in the UK had in place, at the time, a legally foolproof system for dealing with student appeals. Third, that a great deal of time and expense can be spent on a relatively straightforward point, whether Persaud was allowed to see and respond to the reports, the negative view apparently unarguable according to most commentators on the ruling at first instance. This case reinforces the need for the rapid introduction of the new system of external review.

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[3] [2000] Ed CR 635.

Another case reported in the last *Yearbook* which has also gone to appeal concerned a student who sought to appeal her second year assessment by reference to extenuating circumstances, including, eventually, an allegation of sexual harassment by her tutor. The court held that Nash should have been informed of material placed before the Committee considering her case and directed the college to reconsider her case. Having done so, the Committee rejected her complaint that the examiners' decision had been vitiated by material irregularity. Nash thereupon brought further proceedings to quash the second decision on procedural grounds and because of the reasons, or lack of them, given for the Committee's decision. In a lengthy judgment, mainly dealing with whether the reasons eventually given by college officials were acceptable as reasons for their action, the court declined to interfere with the second decision. The court expressed its "regret" at the length, complexity and cost of the litigation. "Much, if not most, of this could have been avoided if [C] had taken and followed competent and sensible legal advice as to its procedures."[4]

Staff

A discrimination claim in a university found its way in 2001 to the UK's highest court, the House of Lords, and has incidentally set a new interpretation on one of the most sensitive areas of UK employment law. This concerned two individuals, A and E, who had been dismissed from employment as paid members of the student union executive of South Bank University. A and E alleged that their dismissal was racially discriminatory under the Race Relations Act 1976 and that university officials had unlawfully "aided" the discrimination under section 33 of the Act. The union had terminated their employment following their expulsion from the university. The university sought to strike out the claim of racial discrimination against it on the ground that its conduct did not fall within the meaning of "aided" in the statute. As the case made its way through the courts, the university first had its strike out claim rejected, then allowed by the Court of Appeal, which held by a majority that the university did not knowingly "aid" the union's decision to dismiss A and E since its officials were not the "prime mover" in the dismissal. The Court of Appeal concluded the termination of employment was an inevitable consequence of their having been expelled from the university.

The House of Lords allowed the appeal by A and E. The facts appear to have been complicated by the university's having taken steps under the still-controversial Education Act 1994 (introduced by the Conservative government to increase the accountability of student unions) to replace elected student representatives by appointed trustees. The House held that having regard to its contextual setting, the word "aided" for the purposes of section 33 should be given its ordinary meaning and it was not appropriate for the Court of Appeal to introduce the concept of "prime mover" and similar terms. A person "aided" whether or not his/her help was substantial or productive, so long as it was not entirely insignificant. The word indicated the provision of assistance to another which "helped" the carrying out of an unlawful act rather than "caused" it. Two members of the House expressed some doubt as to whether the university's acts were sufficient to base a finding that it had "aided" the union. However, the case would not be struck out and would be allowed to proceed against the university.[5]

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[4] R v. Chelsea College of Art and Design *ex p* Nash [2000] ELR 686; [2000] Ed CR 571; Same v. Same [2001] EHWC Admin 538.

Another claim of discrimination, this time on grounds of sex, came before the Court of Appeal but was deferred following reference of questions to the European Court of Justice (ECJ). The case arose in the further education sector but has wider implications for higher education. The complex set of appeals and cross-appeals relates to a decision by Accrington and Rossendale College, facing financial difficulties and costs arising on recent changes in the law relating to part-time workers, to reorganise its part-time teaching provision, terminating fixed-term contracts of hourly paid staff including Mrs. A. The college also embarked on a program of voluntary and compulsory redundancies and ill-health retirements. In the future it would source part-time teaching through a company, which contracts individuals not as employees, but as self-employed. This distinction means that the individuals no longer enjoy employee benefits including sick pay and similar benefits, pensions, or any career structure within the college. A redundancy payment claim was settled. However, Mrs. A claimed indirect sex discrimination on the basis that as many part-time staff were women, the college's action had more impact on women than on men. An Employment Tribunal (the first instance hearing in employment law cases) rejected that claim; while indeed A's plans might impact on one group more than on another, they were decided upon after proper analysis of the problems. Mrs. A further claimed discrimination against her as a contract worker, but the Tribunal ruled she could not use as a comparator for equal pay purposes a male lecturer who continued to be employed full-time by the college. Mrs. A claimed unfair dismissal; the Tribunal agreed but held that it would not be just and equitable for her to receive compensation. The Employment Appeal Tribunal (the first level of appeal) dismissed all of Mrs. A's appeals and also agreed with the first instance Tribunal in rejecting Mrs. A's claims of discrimination as to access to pension and equal pay.[6]

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[5] Anyanwu and Ebuzoeme v. South Bank Students' Union and another and the Commission for Racial Equality [2001] 1 WLR 638; [2001] 2Allo ER 353; [2001] ICR 391; [2001] IRLR 305; (2001) 98 (21) LSG 39; (2001) 151 NLJ 501; (2001) 145 SJLB 110 (HL).

[6] Allonby v. (1) Accrington and Rossendale College (2) Education Lecturing Services (3) Department of Education and Employment [2001] IRLR 364; [2001] Pens LR 185;[2001] EWCA Civ 529; [2001] 2 CMLR 27.

The Court of Appeal, the second level of appeal in such cases, allowed Mrs. A's appeal in part, remitted part back to the Employment Appeal Tribunal and referred some questions to the ECJ. The Court reasoned that the original Tribunal failed to give adequate reasons for its decision that the obvious discrimination was justified and remitted the matter back to the first instance level for a further hearing on that issue and the question of proportionate impact of the college's policy on men and women. The Court remitted the issue of discrimination against a contract worker. The ECJ was asked to rule on whether employment in the same establishment (albeit under different types of contract) was sufficient to establish a claim for equal pay. In addition, the court was asked to address the issue of discrimination in respect of pension rights.

The Interpretation of Charters and Statutes

It is not often that the courts are called upon to interpret the quasi-medieval language of a Royal Charter and Statutes. An interesting case in 2001 concerned the sale of soft drinks in a student union shop. The question for the court was whether these drinks could be considered as supplied by the relevant university and thus exempt from value added tax under legislation which exempts educational and associated services. The answer turned on whether the union could be considered to be an integral part of the university under its Charter and Statutes. At first instance, the VAT and Duties Tribunal upheld the view of the union that indeed it was an integral part of the university. On appeal, the High Court decided otherwise. In a lengthy forensic examination of the Charter and Statutes, the Court found provisions which appeared to conflict and had therefore to decide the matter on balance. Although one clause in the Statutes provided that there should be a Students' Union, it did not expressly state that it was to be part of the university, a phrase used elsewhere in the Statutes in references to other bodies and officers. On the other hand, while the Students' Union was absent from the list of "Members of the University," in provisions listing the membership of the University Court under "Representatives of the University" were included "Three Representatives of the Students' Union elected by the Union." The Court maintained that, on balance, the Students' Union was not an integral part of the university.[7]

The case has wider implications than whether or not students pay 17.5 percent tax on their purchases of juice and sodas. Whether a Students' Union is part of a university depends entirely on the interpretation of the governing instrument. If a student is killed or injured while participating in an event organised by the Students' Union, and some fault is proved on the part of the organisers, which body is liable, the union or the university? In many of the newer universities, the draftsmen of the constitution have made the separation explicit. But the older constitutions often fail to make the distinction.

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[7] Commissioners of Customs and Excise v. University of Leicester Students' Union [2001] BTC 5187; [2001] STC 550; [2001] STI 599.

Associated Colleges

Eager to boost overseas student numbers and therefore resources, since overseas students pay much higher tuition fees than those from EEA countries (European Economic Area being the EU plus Norway, Iceland, and Liechtenstein), many universities have set up subsidiaries abroad or entered into collaborative arrangements with "feeder" institutions. Such arrangements attract the attention of the Quality Assurance Agency which has published a code of practice governing, principally, the quality assurance arrangements it expects to be put in place.

One such university is the University of East London, one of the former London polytechnics which gained university status in 1992. By a memorandum of cooperation signed in 1998, the university established the East London College as a branch or extension in Israel to deliver a law degree course there. The primary purpose of the agreement was to assure the quality of the student experience and standard of the course and to ensure efficient and supportive arrangements for student administration. University officials chose to terminate the arrangements in February 2001 and provided notice in accordance with the memorandum. The memorandum provided that in the event of termination, the parties would make their best efforts to ensure that students already enrolled on the degree course be found alternative places on nearby campuses.

An issue arose in relation to students who had enlisted on a precursor English course and were awaiting admission to the university's degree program. The college sought a mandatory injunction against the university to compel it to carry out interviews of students for the purpose of their being taken on as students to undertake the degree course at its premises in Israel. The court declined to grant the injunction on the basis that it could not ensure its enforcement and it could not regulate academic cooperation in this way. The court opted to leave it to the "good offices and good sense" of university officials to consider how best to avoid undue hardship to the students in question.[8]

Another case concerned, indirectly, the University of Lincolnshire and Humberside, recently re-named the University of Lincoln and formerly known as the University of Humberside. This case illustrates the problems faced by institutions which, seeking to use ever more innovative approaches to the provision of education, using public-private collaboration, find themselves faced with legislative provision from a more traditional age, even though the legislation in question was only passed in 1994. The School of Finance and

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[8] East London College v. University of East London QBD 15 February 2001.

Management in London provided courses that were validated by the university, under an arrangement in which it was referred to as an "associated college." The school contended that it was providing educational services and thus should enjoy certain benefits in respect of indirect taxation, also known as a Value Added Tax. The Commissioners of Customs and Excise disagreed, arguing that officials of the school did not fall within the statutory definition in the Value Added Tax Act 1994 for exemption as it was not a "college, institution, school or hall of a university." The VAT and Duties Tribunal held that although S was not a "college" of the university in the traditional sense, as the fundamental purpose of its business was provision of educational services leading to the award of a university degree, it could fairly be regarded as a "college of the university" for this purpose.[9]

Conclusion

2001 was a relatively quiet year, with the volume of student dispute litigation notably reduced from previous years. It is predicted that this will reduce further still once the new systems of external review are in place and institutions learn from the decisions that have been handed down over the past few years. However, issues of discrimination in employment, particularly equal pay for work of equal value, continue to be raised more frequently than might have been expected.

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[9] School of Finance and Management (London) Ltd v. Commissioners of Customs and Excise VAT and Duties Tribunal 9 April 2001.

11

EUROPE

THE INTERNATIONAL DIMENSION OF EDUCATIONAL POLICY

Jan De Groof

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The Legal International Setting

General

The international dimension of educational policy is becoming an increasingly significant aspect of national educational discourse and of national regulation in educational matters.[1] During the 1980s and 1990s, the most important reforms in European and OECD (Organisation for Economic Cooperation and Development) countries were often legitimized by references to the international situation. Comparative research and international indicators were used more than once as the perfect excuse for dealing with educational policy.

National sovereignty does not have to be regarded as threatened by this shift in educational policy. What is more, Member States of the European Union (EU) have not waited for the Sorbonne and Bologna Declarations in order to give effective content to a common European space for higher education; what can be mentioned is the European Credit Transfer System (ECTS), the addition of the diploma supplement, the language regime applicable to certain courses and course components, the external quality assessments, and the division into undergraduate and graduate level education which comes from the Anglo-Saxon world.

International trends have resulted in voluntary convergence and internationalization within Member States. Yet, there is neither a European-wide model[2] for the organization of education nor is there any need for one. Leaders in every country will have to work out how best to develop structural responses to future challenges. *Trends in Learning Structures in Higher Education*, published jointly by the Confederation of EU Rectors Conferences and the Association of European Universities (CRE),[3] begins with the observation that there are even more systems of higher education than countries in Europe.

Two trends govern developments in national educational systems. On the one hand it is expected that national educational systems guarantee the equality of every citizen in education and that the variety of cultural life is reflected in this. Accordingly, educational systems are highly heterogeneous.

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[1] *See* "Perspectieven voor het internationaal onderwijsrecht" (Prospects for international educational law), *Journal for Education Law and Policy*, 1993-1994, no. 2; *see also* DE GROOF J., "Sat Cito, si sat bene," *Journal for Educational Law and Educational Policy*, 2000-2001, no. 2-3.

[2] SCOTT P., "Unified and Binary Systems of Higher Education in Europe," in BURGEN A. (ed.), *Goals and Purposes of Higher Education in the 21st Century, Higher Education Policy Series 32,* London, 1996, p. 49.

[3] Namely part I by HAUG G., *Main Trends and Issues in Higher Education Structures in Europe;* Part II by KIRSTEIN J., *Information on Learning Structures in Higher Education in the EU/EEA countries,* both parts of the project report: *Trends in learning structures in higher education. ESIB,* Juin 1999.

The imposition of a uniform educational system, such as it was in the former Eastern Block countries,[4] is thus contrary to the principal of mutual respect and democracy. On the other hand, a certain uniformity or comparability between national systems is sometimes internally confirmed or sanctioned without proper internal debate. Yet, for legal reasons there is no room for a purely nationally oriented educational system.

The Inevitable Enforceability of the International Norm

It is worth pointing out that the majority, if not all, of the compulsory provisions of the European Convention on Human Rights (ECHR) have in one way or another been included in the regulations of EU Member States and that the fundamental rights and freedoms, in principle, enjoy national recognition. Even so, it may be expected that when settling educational disputes, national courts will invoke international legal standards more than in the past. Case law of the European Court of Human Rights (ECtHR), the primary constitutional court of the Member States,[5] remains modest in educational matters. Nonetheless, there is no reason to believe that the impact of ECHR in the constitutional sphere will continue to have a minor influence on education.

The test of international law can be viewed as part of the legislative process with regard to regulating sensitive aspects of the right to and the freedom of education, such as access to education; the ideological and/or philosophical principles of state-sponsored schools; the possibility of being exempted from confessional (or confessionally motivated) subjects; compulsory school attendance; the rights of immigrating persons, migrants, and illegals; and observance of fundamental rights in the concrete organization of the school community and equal opportunity policies. The ECHR also becomes visible as a result of the observance of legal principles in educational matters including the problems of hierarchy in connection with basic rights in the event of internal conflicts between rights and freedoms. The criteria for justifiable unequal treatment and application of the nondiscrimination principle for example, as determined by the ECtHR, serve as model for internal jurisprudence. Comparative law is invoked in the approach to third party action (occasionally with the applicability of basic rights in private relationships).

The systematic penetration of international conventions into the domestic legal system is inevitable. Every validly signed treaty forms an integral part of a legal system. Further, in principle, a treaty's direct effect leads to enhanced legal protection.[6] It may be expected that a citizen will, more than ever, invoke interpretations of internal legal standards that conform to a convention and, where applicable, to one of the degrees of its direct effect. The Belgian Court of Arbitration, the quasi Constitutional Court that resolves constitutional conflicts, applies constitutional rules of equality and nondiscrimination in respect of all rights and freedoms, including those with immediate effect that arise from international conventions. This Court has derived a standstill obligation from Art. 13 IPESCR in connection with the desire to achieve cost-free education. The opinion that the consistent recognition of the *ius cogens* of the international legal standard in educational matters, as set out in Art. 13 of the IPESCR,[7] should be avoided, appears to be outdated.

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[4] *See* DE GROOF J., *Educational policy in Russia and its constitutional aspects*, Leuven, 1994, p. 162.

[5] From the very start the Court of Justice recognized the fundamental rights and freedoms as general principles whereof the observance had to be ensured by the Court. Since then this position has been formalized by means of Art. 6, § 2 of the *Union Treaty*, as amended by the Treaty of Amsterdam (1997).

The Convention on the Rights of the Child leads to a greater capacity of minors to proceed and act in law for the purpose of asserting their rights to education (Arts. 28 and 29). This Convention cannot be ignored by national law makers. Other provisions are apparently self-executing and provisions of conventions require states party to the convention to adopt suitable measures via a regulatory intervention.[8]

Dispersal policies, aimed at preventing schools becoming separated into "white" and "concentration" (or migrant) schools, have been criticized for references to the ICERD (the International Convention on the Elimination of all forms of Racial Discrimination) and Guideline 2000/43/EC comprising the application of the principle of equal treatment of persons regardless of race or ethnic origin, even though admissions and referral policy was compatible with internal law. Moreover, it may be expected that international provisions in connection with minorities will be used as a touchstone for drafting policy and national regulations in such matters.[9] This is even more applicable in light of the negotiations currently being conducted on the expansion of the EU.[10]

The Far-Reaching and Irreversible Nature of European Community Law

On the experiences of European educational policy, its possibilities and limitations, there have already been extensive reports[11] on the impact of the multiple principles of free circulation and of the nondiscrimination principle in national educational systems. These principles have a fundamental impact on the educational system of each Member State. It is possible to speak not only of a common market for education but also of a common educational policy. This *acquis communautaire* (community attainment) can only be extended further. Since Maastricht, the EU's constitutional powers include a "contribution to education and training with a high content."[12]

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[6] *See* VANDAELE A., "De directe werking van het VN-verdrag inzake de Rechten van het kind: een stand van zaken" (The Direct Effect of the UN Convention on the Rights of the Child - a status report), *Kinderrechtengids*, Gent, 1998, I.

[7] And not alone Art. 13, §§ 1 and 3.

[8] This is explicitly set out by the Belgian Council of State, Legislation Section, *Doc.*, Chamber of Representatives, 1990-1991, no. 1568(1).

[9] DE GROOF J. & FIERS J., *The legal status of minorities in Education*, Leuven, Acco, 1996, p. 435.

[10] *See* "Education law as 'trait d'union' between national communities within the broad European framework and within a national state," *European Journal for Education Law and Policy*, vol. 4, 2000, no. 2.

[11] *See* VERBRUGGEN M., *Tussen subsidiariteit en harmonisatie. Een onderzoek naar de*

Admittedly, the agreements regarding higher education in Europe are based on a mere intergovernmental procedure, something that is open to criticism. On the other hand, the intergovernmental approach does have the virtue of a measure of efficiency. A community action would indeed not have achieved such a result in a short period of time. Similarly, the Lisbon Convention on the academic recognition of diplomas continues to labor under the weakness of its legal enforceability.[13] "Harmonization" in consequence of the European Directive no longer appeared to be feasible or has, in the meantime, been abandoned, even with respect to the recognition of diplomas for professional purposes, and replaced by the equivalence principle. This approach links with the general principles of community law, which are based on mutual trust and equivalence.

The European dimension of a national educational system should be regarded as an essential characteristic of the culture and education of each Member State. Quality assurance and mobility demand more, not less, from Europe. The struggle for convergence,[14] and not for harmonization, which still remains very much in question, offers full protection for a national interpretation of the concept of education, of the syllabus, and of the final objectives or development aims. The haste with which some Member States are implementing the Bologna Declaration to regulate higher education, in particular the Netherlands and Flanders, certainly does not seem to point in that direction.

Internationalization, where such is intrinsically necessary, is still not consistently applied. The accreditation of tertiary education, as it is now viewed in draft legislation in several Member States, is a good example of this kind of incomplete arrangement. In the absence of communal rules of transparency and a minimum uniformity of criteria, virtually no advance in the Common European Educational Space can be expected with respect to quality

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instrumenten voor het voeren van een Europees onderwijsbeleid (Between subsidiarity and harmonization. An inquiry into the instruments of a European Educational Policy), doctoral thesis KUL, 2001; *see also* DE GROOF J., PENNEMAN H., "European Education Law I," *The Yearbook of Education Law 2000*, and "European Education Law II," *The Yearbook of Education Law 2001* (in preparation).

[12] Art. 3, 9.

[13] *See, e.g.*, SCHEELE, J.P., MAASSEN, P.A.M., WESTERHEIJDEN, D.F., *To be continued ... Follow-up of quality Assurance in Higher Education*, CHEPS, 1998.

[14] In itself this is a principle that can be deduced from Arts. 149 and 150: DE GROOF J. etc., FRIESS B., "Opportunities and limitations for a European education policy," *European Journal for Education Law and Policy*, vol. 1, 1997, no.1-2, p. 9.

control and, moreover, the credibility of the envisaged accreditation mechanism as such is very much in question.[15]

Due to the observance of the intergovernmental procedure and the far-reaching nature of the Sorbonne and Bologna Declarations,[16] the appeal to the principle of subsidiarity[17] has been somewhat neglected. The classic arguments for resisting the "interference of Europe" no longer sound particularly credible in this context.

The open coordination method, which was adopted during the Portuguese presidency at the European Council of Lisbon, could be an acceptable halfway position between a theoretical communal harmonization and the fearful preservation of national autonomy.[18] This method is described in further detail as an alternative to European (co)regulation in the *White Paper on European Governance*, July 25, 2001,[19] of the European Commission, including the common objectives and guidelines.

Toward a European Constitution and Its Impact on Educational Law

The EU's Charter of Fundamental Rights, signed as a political declaration in December 2000, and the works started in March 2002 for the Convention do not lead to drastic changes in the delineation of mutual competencies. The complementary role of the EU in educational matters continues to be stressed in the European Parliament,[20] whether a further mutual sharing of responsibilities between the EU and Member States depends on specific measures in accord with the relevant community educational program. As yet, there is no detailed common European policy; on the other hand, the loyalty requirement in respect of Europe will constantly question the national administration. Consequently, this will again raise the question of whether Member States with an extensive catalogue of basic rights will not be exposed to pressure as soon as a European Constitution is drafted. Even though the right to education calls, by its very nature, for regulation by the State (regulation which may vary in time and place according to the needs and resources of the community and of individuals, according to the ECtHR),[21] the conformity of national law to such a constitution will have to be checked carefully in future.

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[15] Unanimity can be seen between for example the Opinion dated 29 May 2001 of the *Educational Council* in connection with the "Bill of law on accreditation in higher education" and one of the leading articles on this matter, namely that of VAN DAMME D., "Internationalisation and quality assurance: Towards worldwide accreditation?," *European Journal for Education Law and Policy*, (Kluwer Law International), 2000, no. 1.

[16] The term *harmonization* no longer appeared in the latter *Declaration*.

[17] *See* Art. 5 of the *Convention*.

[18] *See, e.g.*, VERBRUGGEN M., "Het Europees onderwijsbeleid en de Bologna-verklaring: terug naar af?" (European educational policy and the Bologna Declaration: back to square 1?), *T.O.R.B.*, 2001-2002, p. 173 *et seq*.

[19] COM (2001) 428 final.

[20] *See* the "*Lamassoure report*," in the *Committee on Constitutional Affairs (European Parliament)*.

Due to, and in spite of, the original unfamiliarity,[22] the legal relevance of the Charter can hardly be called into question[23] and certainly not now, when European courts already invoke it and its designation as soft law;[24] it is chiefly the business of countries, which can base themselves on an *acquis* in respect of the pacification of education and a constitutional refinement of fundamental educational rights,[25] to prepare for the Convention dynamic and to be watchful.[26] After all, the Charter comprises the prospect of positive obligations incumbent on the Member States, and which go further than the usual ECHR interpretation.[27] Here the interpretation will be considered of the basic rights as general principles of Community Law, arising from Art. 6 (ex art. F) of the Maastricht Treaty[28] and the common constitutional traditions of Member States, albeit within the educational competence of the EU.[29]

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[21] In its first judgement on the principle dated 23 July 1968, Series A no. 32.

[22] MENTINCK D., GOUDAPPEL F., "The education provision in the charter of fundamental rights of the European Union: A bleak perspective," *European Journal for Education Law and Policy*, no. 2, 2000, p. 145.

[23] *See* DE WITTE B., "The Legal Status of the Charter: Vital Question or Non-Issue," *Maastricht Journal of European and Comparative Law*, 2001, 1, p. 81 *et seq.*

[24] WEBER, "The European Charter of Fundamental Rights," *German Yearbook of International Law*, 2000, 106-113.

[25] This is especially so in the Netherlands and Belgium; see the ranking in DE GROOF J., GLENN Ch., *Finding the Balance. On Freedom, Accountability and Quality in Education*, Utrecht, 2002, 658 pages.

[26] Franklin DEHOUSSE denounced the lack of democratic consultation and transparency during the drafting of the Nice Convention. This IGC (intergovernmental conference), like the previous one, is a flagrant violation of the principle of transparency. In theory one could go on talking indefinitely about the usefulness of a European Constitution. In fact the European Treaties already represent a constitution: they define the basic rules of a political system. It cannot be accepted that a document so essential as this should be amended behind closed doors, without any official records and sometimes in a spirit of pure improvisation. "La traité de Nice: un tournant fondamental l'histoire de l'intégration Européenne," (The Nice Convention: a pivotal moment in the history of European integration), *Journal des Tribunaux*, 12 May 2001, p. 413.

[27] Even though the relevant Art. 14 is placed in the Chapter dealing with *Freedoms*—and not with the the *Social Rights*. (For more about the implications of this distinction: VAN BOVEN Th., "Les critères de distinction des droits de l'homme" (The distinguishing criteria of the rights of man), VASAK K. (ed.), *Les dimensions internationnales des droits de l'homme*, Paris, 1978, p. 53.) But it is precisely this characterization that gives rise to questions. *See also* BERKA W., "Human Rights: A challenge to Educational Law: A survey within the Systems of the European Convention on Human Rights," in DE GROOF J., MALHERBE R. (eds.), *Human Rights in South African Education*, 1997, p. 199 *et seq.*

[28] 7 February 1992 "concerning the European Union."

[29] *Cf.* with USA: LENAERTS K., "Fundamental Rights in the European Union," *European Law Rev.*, 2000, 575.

Also, with respect to cultural rights, including language rights,[30] can the future Europe Constitution grow into a significant instrument for the diversity of cultural communities in the EU to the future? At the least an explicit clause should be included to grant preeminence to internal law should this offer greater protection than the Convention.[31]

The Charter of Fundamental Rights of the European Union guarantees a right to education in Chapter 2 (Article 14). According to these provisions, everyone has the right to education with access to vocational and continuing training (para. 1), which includes the possibility of receiving free compulsory education (para. 2). This also includes the freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical, and pedagogical convictions shall be respected, in accord with the national laws governing the exercise of such freedom and right (para. 3).

Article 14 of the Charter, on the right to education, is obviously formulated in positive terms. Taken literally, it is the right to access education which easily might imply positive obligations on the EU and Member States, when they are implementing Union Law (Article 51). Thus, it can be submitted that Article 14 of the Charter embraces an individual's right to receive an education and that imposes a duty to establish public educational institutions if they do not exist. If the right to education has to be effective, its exercise requires the existence and the maintenance of a minimum of education provided or supported by the state. Otherwise, such a right would be illusory, especially for those of insufficient means.[32]

Both the philosophical roots of the right to education and legal comparisons demonstrate that this right has something to do with the notion of freedom.[33] In this tradition, education enables a human to develop his or her personality and human dignity freely.[34] This implies freedom of choice between different kinds of education or schools, mainly in the context of religious, philosophical, or pedagogical convictions or for reasons of language or ethnic affiliation. This also comprises freedom from indoctrination in educational institutions and asks for respect for the personality and human rights of the learner who has to be protected against misguided forms of educational influences. It might also include the freedom of home instruction. Such an interpretation brings a dimension of individual freedom to light, which has to be protected against state infringement and which could comprise even some forms of horizontal effects.

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[30] Is the case law of the European Court of Justice already drawing the outlines of a "European Case Law on Linguistic Rights?": PALERMO Fr., "The use of Minority Languages," *Maastricht Journal of European and Comparative Law*, 2001, 3, p. 299 *et seq.* This author sees a remedy chiefly in 'the linking of minority protection to the cultural dimension of the Community', *id.*, p. 318.

[31] Such as Art. 60 ECHR Art. 5, § 2 ICCPR, art. 41 Convention on the Rights of the Child.

[32] With respect to the Convention's Right to Education some scholars would also argue, that this provision comprises some positive obligations, at least at the level of primary education; cf. VAN DIJK/VAN HOOF, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (1990) 467; NOWAK, "The Right to Education," in: Eide/Krause/Rosas (eds), *Economic, Social and Cultural Rights* (1995) 189 (204); BERKA, *Human Rights: A Challenge to Educational Law: a Survey within the System of the European Convention on Human Rights*, in: DE GROOF/MALHERBE (eds), *Human Rights in South African Education* (1997) 199 (204).

[33] *See* MENTINK Dick and GOUDAPPEL Flora, "The education provision in the charter of fundamental rights of the European Union: a bleak perspective," in *European Journal for Education Law and Policy*, vol. 4, 2000, pp. 145-148; BERKA Walter, "The right to education in the Charter of Fundamental Rights in the European Union," in *European Journal for Education Law and Policy*, vol. 5, 2001 (forthcoming).

Based on this interpretation, one must consider the right to education not merely as a social right to receive education but as one of equal access to educational institutions that the state has to provide. That is, it must be seen as freedom protecting against any infringement in the human personality, which might occur in the process of education.[35] At the same time, it is not clear whether the drafters of the Charter had these implications in mind when they put the right to education in its chapter on freedoms.

According to paragraph 3 of the Charter, the freedom to establish private schools is limited by respect for democratic principles and must be exercised in accordance with the arrangements defined by national legislation. This repeats and stresses the necessity to regulate many aspects of education, which is a general aspect of the right of education. Further, the evocation of democratic principles will exclude certain types of private schools such as those which intend to discriminate against certain pupils or which apply discipline in a way that is not compatible with respect for human rights. Yet, a question remains as to whether there already is a common standard within the EU with respect to all issues related to education that might involve democratic principles.

What might be startling in connection with the right to establish private schools is the strange reason given for this freedom. The explanatory notes indicate that the freedom to found private schools is one of the aspects of freedom to conduct a business. However, a pure economic approach runs short, should it be its main or sole justification. Such an approach would neglect the dominant aspect of pedagogical, religious, or ethnic choice that motivates the maintenance of private educational institutions in most cases. Any interpretation of the right to open private schools based on a pure economic ratio would curtail fundamental aspects of this liberty and lead to the wrong consequences.

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[34] *Cf.*, *e.g.*, Article 29 of the UN Convention on the Rights of the Child.

[35] *Cf.* with respect to the right of education as it is guaranteed in international human right's documents DELBRÜCK, *The Right to Education as an International Human Right*, 35 German Yearbook on International Law (1992) 92 (100 *et seq.*); Nowak (no. 15) 195.

Brief Conclusion: The Relative Autonomy of National Education Law

Article 2 of the First Protocol of the ECHR brought education into the field of the ECHR's application with the greatest of care. In view of the complexity of national educational law and the fact that the sphere of EU activity with respect to education was regarded with suspicion, there was a growing realization that no Member State which was party to the respective Conventions could allow itself to continue to be isolated. EU educational space demands a common educational policy and must be supported by the same principles of law, leading to coherent regulation. Moreover, common objectives and standards do not prevent education from continuing to be embedded in national traditions and based on specific cultural, social, and confessional values, as well as on a diversity of social and economic policies. Both European educational policy and basic rights relating to education raise a continuous series of questions about the discretionary space that the Member States dispose of. Thus, national regulation should be more emphatically justified in respect of European and human rights dimensions.

The Consequences of the Bologna Declaration: The European Higher Education Area

General

The imminent expansion of the EU with the admission of new Member States points to the need for a variety of solutions while strengthening, rather than diluting, the European project. The search for this balance is already being felt in the EU's fifteen Member States and must continue to contribute to an escalation of the finality of Europe. Culture and education, universities and colleges of further education have a special role to play in this respect. In particular, centers in Eastern and Central Europe invariably refer to improving the cohesion of the European higher education area[36] as one of the four roads to development of European universities.

Concern about the need to put the economic approach to education into perspective, expressed polemically as functionality versus spirituality, and the continuing need for diversity within unity, uniformity versus authenticity, are factors borne in mind by the reading of the Sorbonne[37] and Bologna[38] Declarations by an undoubtedly important and select group of ministers. *Trends in Learning Structures in Higher Education*, partly initiated by the Confederation of EU Rectors Conferences and the Association of European Universities (CRE),[39] and produced in preparation for the Bologna meeting, starts with the assertion that there are even more systems of higher education than countries in Europe. On the other hand, there are different trends affecting the structure of degrees and qualifications in Europe. There is particular interest in the recent reforms in Germany and Austria that introduced new bachelor's/master's curricula on a voluntary basis and in Italy and France where the existing curricula are being reorganized into first degree and postgraduate levels.

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[36] *E.g. Les universités dans leur milieu social et économique*, Conférence Nationale Tempus, Romania, November 1998, published by Romanian Tempus Office, Bucharest p. 304.

[37] *Joint Declaration on Harmonisation of the Architecture of the European Higher Education System*, 25 May 1998.

[38] *The European Higher Education Area*, 19 June 1999.

It must be said again: there is no Europe-wide model[40] for the organization of higher education and there is no need for such a model. Each country will have to work out for itself the best structures to meet future challenges. The OECD monograph, *Redefining Tertiary Education*,[41] confirmed that the crucial issue is not whether the system has a unitary or binary structure and that the diversity of learning structures need not mean that there is a huge gulf between different learning trajectories. This is also true at an international level. It would not be worthwhile trying to develop uniform systems across Europe. Further, it is not clear how the adoption of a two-level system (bachelor's and master's) across Europe could be realized in the context of Arts. The implementation of the convergence principle[42] has to remain in conformity with the responsibility of the Member States.

In a number of countries, people have started to reflect on the progress and outcomes of courses as well as the best way to structure higher education courses with the coordination of academic courses. This includes the debate around the naming of diplomas and minimum study periods to attain diplomas. One cannot avoid looking at this from an international perspective: a new generation, as it were, of initiatives for voluntary convergence and internationalization of the education systems in each of the Member States.

Comparability of degrees has to be based on proven—not just claimed—academic quality. The credibility of the quality control and inevitable claim to an enhanced European dimension in quality assurance and evaluation[43] would seem to be more effective than harmonization is difficult to achieve. To this end, as soon as Article 126 was ratified, it was predicted that one of the most urgent tasks of the EU would be the promotion of quality care. There are convergences in this area, too, but educational research indicates that the context of each individual educational institution is still a decisive factor in quality analysis.[44]

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[39] In particular, HAUG, G., *Main trends and Issues in Higher Education Structures in Europe*; KIRSTEIN, J., *Information on Learning Structures in Higher Education in the EU/EEA countries*, *see* footnote 4.

[40] SCOTT, P., Unified and Binary Systems of Higher Education in Europe, in; BURGEN, A., (ed.), *Goals and Purposes of Higher Education in the 21st Century, Higher Education Policy Series 32,* London 1996, p. 49.

[41] OECD, Paris, 1998.

[42] *See, e.g.*, LENAERTS, K., "Subsidiarity and Community Competence in the Field of Education, in the first Report of the European Education Law and Policy Association (ELA);" in DE GROOF, J., (ed.), *Subsidiarity and Education, Aspects of Comparative Education Law,* Leuven-Amersfoort, 1994, p. 117 ff.

[43] But not necessarily *accreditation*. The eagerly worded appeal for "accreditation agencies" to be set up, independent of national and European authorities and working along subject lines, as outlined in the above-mentioned document *Trends and Issues in Learning Structures in Higher Education in Europe*, in preparation for the Bologna Declaration, does not tally with the primacy of the academic authorities' powers to recognise objective standards themselves, individually and jointly.

Transferability of credits is even more important. The establishment of a generally accepted and applied system of credits requires agreement, a fortiori in relation to the non-university sector, on objectives and levels, readability and comparability, and the awarding of credits as a means of quantifying minimum effort. Complete agreement needs to be reached about the fundamental features that constitute a university. There needs to be complete clarity on the admission requirements for a person to enter higher education such as twelve years in primary and secondary education, not counting any time spent in school before the age of six; and on whether a possible professional bachelor's qualification, following three years of education outside of a university, counts the same as an academic bachelor's degree for admission to postgraduate courses.

Interludium:The "Idealistic" Versus the More "Functional" Concept of the University. A New Synthesis?

One of the advantages of the Bologna Declaration is that it immediately debunks the myth of "the university." Even philosophers have occupied themselves with attempts to classify the concept of "the university" in categories ranging from the classical model of the unconditional and pure idea of the university to the more market-oriented and government-influenced concept of the function of the university, namely, the public service which, in certain countries, used to be a part of the state administration. Humboldt wrote about the lonely freedom of science while Whitehead spoke of the university as a "service to society."[45]

The synoptic table that follows offers a concise representation of various concepts of the university which, when they are translated to their modern counterparts, point to the current complexity of the missions and expectations of the contemporary university. Many of these contradictions seem to have become artificial. For instance, training young people to take up executive functions or to form a professional elite is not incompatible with the mission to search for "Truth, Justice, and Beauty." However, there is a real danger that certain highly specialized courses, even though they are of an academic level, remain devoid of the question as to meaning of "universality," and that the critical, innovative mission of the university fails to extend to certain courses.

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[44] *E.g.* SHAH, T., "Quality Management, Quality Assessment and the decision-Making process. The IMHE Project on Institutional Impact," in: BRENNAN, J. et al., *Standards and Quality in Higher Education, Higher Education Policy Series 37,* London 1997, p. 214.

[45] DREZE J., DEBELLE J., *Conceptions de l'Université,* Paris, 1969, pp. 8-22.

The coherence in each of the "concentric circles,"[46] the unity in diversity, must be made explicit in the mission or "charter" of the institute of scientific education. This applies to all academic institutes the world over.[47] *(See chart on the following page.)*

It has been predicted that the market-oriented approach or "market culture" of the university would clash with the Humboldtian education ideal and its accompanying "basic assumptions and beliefs." According to a Dutch analysis,[48] the solution can only be found in a redefinition of the core tasks of the university, limited to scientific education and research with broader attention for tasks geared toward society and the market. In a more recent version of their research, the Dutch authors argue that the law should clarify, specify, and tighten regulations on these matters.[49] In some European regulations, the balance has been, in the past, in the triple mission of the university (and later of the college too). These authors maintain that the mission is the core of the Networks on Higher Scientific Education that must display the following characteristics:

> a) The primacy of scientific research is what Paul Ricoeur[50] calls the *"préséance"* of the permeation of science and research into all branches of education. To a certain extent, this includes the active interaction of lecturer and student in their common search. There has to be a resonance of the intellectual adventure, for instance, in the sense of rejecting a strictly one-way educational relationship between an all-knowing teacher and students who do not have that prerogative (remember the wise words "I learned a lot from my teachers, more from my fellow students, but I learned the most from my students"). Subsequently, an academic community needs to be formed *a communio,* which demands much more than a tidy campus complex.

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[46] DE GROOF J., "Hoe confederaal worden universiteiten en hogescholen? Een toekomstverkenning over de structuur van het tertiair onderwijs: een relatie in de kering," in *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid*, 2000-2001, pp. 90-106.

[47] One of the most disappointing moments after the joint drafting of the new law on the universities and academies in Russia, which provided for their autonomy for the first time in history, was the demand of the Russian conference of rectors—with the exception of the Moscow Lomonosov University and the State University of St. Petersburg—for concrete guidelines and models from the government, before drafting their own Charter.

[48] MOUWEN C.A.M., BIJSTERQVELD S.C., "Von Humboldt in een modern jasje," *Academia, Juridisch Beleidsmatig tijdschrift,* VNSU, 1998, 15, p. 16 *et seq.*

[49] *E.g.* "in the context of specifying the justification and supervision, and of guaranteeing that accounts are kept in such a way that the various flows of funds remain clear and distinguishable."

[50] DREZE J., DEBELLE J., *Conceptions de l'Université*, Paris, 1969, pp. 8-22.

Summary Chart of the Five Concepts

	Part One: Idealistic Concepts			Part Two: Utilitarian Concepts	
Chapter	I. A Seat of Learning	II. A Community of Scholars	III. A Center of Progress	IV. An Intellectual Mold	V. A Production Factor
Principal Author	J.H. Newman	K. Jaspers	A. N. Whitehead	Napoleon	Council of the Ministers of the USSR
Goal	The fulfillment of the individual's desire for learning	The fulfillment of mankind's desire for truth	The fulfillment of society's desire for progress	Political stability of the state	Edification of the Communist society
General Concept	A general and liberal education; universal learning	Unity of research and education, covering all the sciences	The symbiosis of research and education, in the service of the creative imagination	Professional and uniform education, entrusted to an organized staff	A functional tool for professional and political training
Principles of Organization	Pedagogy of intellectual development; boarding schools and "tutors"	A rational organization into faculties; academic freedom	Professional and creative staff; students capable of applying some general principles	An administrative hierarchy; uniform programs	Controlled manipulation of the granting of diplomas; recourse to all the productive forces of the nation
Conclusions with Regard to the Problem of Offering Education to the Masses	A diversified range of institutes of higher education, among which the universities maintain their originality			An official uniform network for both the masses and the elite	Gearing of the number of students to economic needs and diversification of institutes

b) The touchstone of academic freedom brings one to the old and new, challenging the vast principle of academic freedom. It is probably no accident that it is mainly the new democracies that give this freedom so much attention, even down to their constitutions,[51] as every freedom implies a right. Here, too, a great deal of inspiration can be drawn from, for example, the highly creative writings of South African universities, which are a reminder that old democracies should remember the fundamental questions more often.[52] Academic freedom needs to be supported by the autonomy of management and administration but it also implies the great task of assuming shared responsibility and joint management. Academic freedom requires faculty to make decisions about other faculty and the content of their instruction, on the basis of academic excellence alone—the core of a broad Anglo-Saxon study. The American Association of University Professors adds that the professor does not speak for the institution, nor the institution for the professor. This joint management of all levels—the so-called *Drittelparität* of the German and Austrian universities (students, faculty, staff, and, in certain cases, stakeholders too) is something which several Higher Education Institutes in Europe find hard to uphold in practice.

c) The underlying values mean that there is the ethos of the institute. The scientific center will place itself in the context of a broader cultural project, while seeing to it that the institute remains or becomes a locus of innovation and critical reflection, and of the education of students. This education does not necessarily have to be aimed at producing new scientists, but must always be geared toward educating them to be independent persons who can participate in science and culture. This is, in the end, the ultimate service to society.

The literature refers, repetitiously, to the factors of change which affect higher education, which it may proactively seek out: the changing role of the government, the trend toward deregulation, a certain diversification of institutes, and the gearing of national politics to the international context. Each of these trends raises critical questions. One example is that of autonomy, which comprises both universities and colleges. Most international reports on education identify the demand for increasing autonomy as one of three cardinal trends of any modern education policy, along with the care for quality and the assessment techniques this requires, and the concern for special target groups, usually the underprivileged. Yet, one can hardly deduce a uniform notion of autonomy from the comparative indicators that are regularly published.[53] There appears to be major differences of opinion, depending on the specific disciplines and on the administrative organization of the education system in a particular country. It does not even seem to be contradictory to state that the increasing delegation of powers to the local education level is accompanied by an increasing power of the central authority such as when it comes to guiding education processes, establishing the national framework curriculum, or government-run output control.

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[51] *Cf.* DE GROOF J., NEAVE G., SVEC J., *Democracy and governance in higher education*, The Hague, Council of Europe 1998, 401 pages.

[52] MALHERBE R., "A fresh start I: Education rights in South Africa," *European Journal for Education Law and Policy*, 2000, vol. 4, pp. 49-55; MALHERBE R., "A fresh start II: Issues and challenges of education law in South Africa," *European Journal for Education Law and Policy*, 2000, vol. 4, pp. 57-68; and his contribution "New beginnings: Introducing the South African Constitution and Bill of Rights," in DE GROOF J., MALHERBE R. and SACHS A. (eds.), *Constitutional Implementation in South Africa*, 2000, pp. 10-27.

Autonomy is considered the best precondition for gearing education to the changing needs as regards knowledge, abilities, and qualifications. The OECD *Reviews of National Policies for Education* also points to the ubiquitous option of decentralization of administrative responsibilities and increased autonomy in primary, secondary, and tertiary education since the early eighties. With regard to higher education, the general assumption is that independence is one of the essential characteristics of the administration and management of a university or college, but the ways in which this idea is put into practice differ greatly.

The degree of autonomy seems to have the direct influence that is claimed for it on essential aspects of the administration and management of an educational establishment, which includes the quality assessment method and in particular the school's self-assessment, as well as the decision-making procedures and structures of participation. Generally, it is assumed that there is also a direct correlation between the degree of decentralization and "flexibilisation," a notion that seems to have gained considerable ground in recent years.

The *White Paper on Education and Training, "Teaching and Learning"* stated, "Experience has shown that the most decentralized systems are also the most flexible, the quickest to adapt and hence have the greatest propensity to develop new forms of social partnership." It remains to be seen to what extent this will be the case in practice and that includes the legal framework of education.[54] It would be useful to undertake a comparative study of the flexibility of regulations on matters of education in Europe.

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[53] See the comparative study and the national reports in: BERKA W., DE GROOF J., PENNEMAN H., A., *Autonomy and Education. Yearbook of the European Association for Education Law and Policy*, The Hague, 2000, 420 pages.

[54] On this subject: SCHADE A., "A research topic in education law and policy: The development of regionalisms in Europe and their impact on educational policy and administration," *European Journal for Education Law and Policy*, vol. 4, no. 1, 2000, pp. 35-39.

The Primacy of Quality Assurance

The techniques of accreditation in the United States (U.S.) can boast of a tradition of more than one hundred years. In the U.S., accreditation is part of the "culture" of higher education and results in affirmative or negative decisions with an immediate administrative effect. This is so because higher education in the U.S. is situated in a competitive market and is governed to a great degree by self-regulation rather than by government intervention.

Formal systems of accreditation in Western Europe are much more recent: the first system, which was the French, was introduced about fifteen years ago. They are considerably more varied than those of the different American states, although they do have a number of characteristics in common. These can be summarized as follows:

a) until now, accreditation as such has not been the core concept; rather, systems have centered on evaluation;

b) the public or quasi-public sector is dominant;

c) the goal has mainly been to promote or guarantee quality throughout the national system of higher education. As yet, the aim is not so much to achieve academic excellence at individual institutions but consists of a broader spectrum of government objectives such as international competitive position, professional qualification, curbing the government budget, and development of scientific research geared towards innovation;

d) the contribution of the government, whether obligatory or voluntary, to the development, observance, and implementation of quality control was decisive for a while even though institutional self-evaluation was always viewed as the key element;

e) there has been a lack of consensus on the legal, administrative, or financial consequences of quality assessment.

In the meanwhile, there has been a formalization of the quality assessment techniques commonly used at universities: student evaluation and selection, peer review, mutual competition for scientists, academic careers and promotion, and on the other hand, explicitly formal and detailed procedures for information such as after screening a program, auditing, competition, (internal and external, self- and meta-) evaluation, and accreditation.

The continuing influence of government regulation, a tradition that goes back to the medieval university charters, is proving to be an established feature of higher education in Europe. Naturally, the fact that the state had, and still maintains, a sphere of influence by means of administrative practice or regulations remains connected with the *effectus civilis* of the diplomas, granting access to other programs or to a profession, as well as with government funding of education and science and the efficient employment of resources, with imperative national and international law, with the observance of the principles of democratization and accessibility of (higher) education, and, not in the least, with quality assurance.

A few critical reflections on quality control, as practiced in several European states, can be formulated as follows.

a) Although there are considerable differences between institutions, external control is generally experienced as positive compared to internal quality assurance. Further, the belief that certain universities would have a sufficiently strong administration to achieve quality control on their own initiative has been exposed as a myth.

b) The effectiveness of external quality assurance as a stimulus can hardly be denied. While its implementation stays within the sphere of autonomous policy and is usually thorough, feedback demands an open debate and a carefully chosen set of arguments; this is all the more urgent for those institutions where not all of the preconditions for following up on reporting are met. The question becomes how an institution's mission is given its due in real terms.

c) Not enough attention is being devoted to innovation, strategic planning, and ambitions to break new ground. Independent and creative learning is not being introduced sufficiently. New learning processes should be tested, using new forms of information and knowledge technology. Training programs are found to be too uniform across institutions.

d) The connection between the results of the quality analysis and a positive or negative sanction from the government remains an open issue.

e) Personnel policy is at the core of a proper quality assurance system. More room for an autonomous policy would seem desirable and raises the question of the further degree of power centralization.

f) How credible is quality analysis if it restricts itself to education and does not extend to research? In any case, the concrete effects of scientific research on the curriculum should be studied.

g) No system of quality analysis can be credible if it is not resolutely organized at the international and supra-national level.

h) Integral quality assurance also aims at gaining an overview of an institution's total daily operation including all of the workflows, infrastructure, and social facilities; in short, this refers to an institution's whole ethos.

A Framework for Positive Norms—A Casus: Belgian Regulations on Quality Control (Flemish Community)

Educational Aspects

Twelve principles apply to aspects of quality control in education, as laid down in legislation. The first principle presupposes that institutions are primarily responsible for taking care of the quality in secondary education.[55] The second principle states that combined universities are responsible for the external quality control in their educational system and that for this they must build a system of visitations.[56] For those visitations, authorized institutions (named Visitation Committees) will need to be created. They must have, certainly for the universities, an international structure. The subject of evaluation is the quality of the educational system and the study of the discipline related to the course, intertwined with the educational system. A quality evaluation will be done according to a number of aspects and parameters to be determined in advance. These must include a set of general criteria, defined in a protocol, and of specific criteria which depend on the course or discipline.[57]

The third principle explains that the combined institutions must draw up a covering schedule for the external evaluations of all university courses, including academic classes and advanced education. According to the fourth principle, a visitation committee will record their conclusions in a well founded report which, in principle, is public.[58] Fifth, within a year after receiving a report, an institution's board will submit a plan to the Flemish government, indicating how it intends to handle the report along with the measures they intend to take in order to remedy the inadequacies that were found. Sixth, an institutional board will have to report comprehensively in its annual report about the measurements that were made and their effects and results.

Seventh, the principle applies that the evaluation of staff forms a part of the quality management by an institution's board. The eighth principle is that the government will guard the quality control process and will see to it that the institutional boards adequately manage the results of quality evaluations. The ninth principle maintains that the government will perform screenings of the quality management of the institutions, known as quality audits.

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[55] Flemish parliament, Doc. 1348 (session 1998-1999), no. 1, p. 18.

[56] Individual institutions themselves can also initiate external visitations.

[57] The visitation results should not result in the ranking of courses in relation to the institution. The Explanatory Memorandum states, however, that it is indicated that the visitation reports will express value judgments about various aspects that contribute to the quality. Those interested will be able to draw their own conclusions.

[58] The committee will give an evaluation of each aspect. In this way the end result will be differentiated for each course and at the same time a form of benchmarking is provided.

In the tenth principle, the government will see that all courses in the eight-year period are subjected to an external quality audit. According to the eleventh principle, the government, if the need arises, will be able to perform a direct investigation themselves of the quality into the educational system, (i.e., of the corresponding investigation).[59] The twelfth principle declares that the government will be able to impose sanctions.[60] Thus, as with actors, the spotlight is directed on institutions themselves which either set up visitations or combine their efforts. The government will supervise and, if necessary, will act itself.

Articles 122 through 124 of the Flemish University Decree stipulate the following.

Art. 122. The university is responsible for both the internal and external quality control:

> The university must supervise on its own initiative the quality of its educational and research activities.
>
> The university involves the students, alumni, and external experts in the field of education and research in the procedures of internal and external quality control.
>
> The university arranges for its educational and research activities to be assessed on a regular basis, at least once every eight years, and this in close collaboration with other universities at home and abroad. The results of the assessment are published in a public report.
>
> The university integrates the results of the quality assessment in its policy.

Art. 123. The government oversees the quality control by the universities as follows:

> The Government of Flanders examines on a regular basis the effects and effectiveness of the internal and external quality control by the universities.
>
> Without touching the ideological, scientific, and pedagogical freedom of the universities, the Government of Flanders can have the quality examined of the educational activities in the trainings or group of trainings of its choice, and of the research activities in

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[59] In other words, in that case the government will set up visitation committees which will, apart from that, work analogously. The government will entrust that assignment to the administration in question, which will provide in their organization a group of government officials who can act rather autonomic, without detracting from the policy to be made. For that it will be necessary to appeal to higher qualified individuals.

[60] In this context see the modification of article IV.6 educational decree X of article 123,2, where the words "The Flemish government has comparative inspections carried out" will be replaced by the words "The Flemish government *can* have comparative inspections carried out" and the words " She states" are replaced by "*In such cases* she states."

> the fields of its choice by means of a competitive study. For this purpose, it appoints a commission of independent experts to make a public report of their findings, which will be sent to the VLIR (Flemish Interuniversity Council), the VLOR (Educational Council of Flanders) and the Council of Flanders.
>
> The Government of Flanders sees to it that the universities integrate the results of the quality assessment into their policies.
>
> Each year, the universities elaborate in their annual report on the quality control and the measures they have taken to act upon the findings and recommendations of the internal and external assessment.

If, according to the Government of Flanders, a quality assessment by an external visitation committee proves that the quality of the educational and research activities of the university in question are alarming, six months after the Government of Flanders has announced its opinion a university's board should present a plan which points out the measures it is planning to take to eliminate the recorded shortcomings. Subsequently, the board must present an annual report of the execution of the plan and its outcome. After four years, a university board must provide an external assessment of the quality of the educational and research activities, with the results published in a public report.

Art 124. If, after an extensive quality investigation performed according to articles 122 and 123, the quality of the education in a university training is considered highly unsatisfactory or is with good reason considered as not belonging to higher education, the Government of Flanders can decide that students in that course of training do not qualify for the determination of the level of the aid meant in chapter VIII and/or that a university board is not allowed to award the training with a university degree. On the other hand, registered students should get the chance to finish their training with a university degree. The Government of Flanders takes the necessary measures in this matter.

A decision to exclude can only be taken after the Government of Flanders gives a university a warning. The warning must declare that the Government intends to act to exclude the university for a period during which it must act on this warning and the Government can be consulted on this matter, if desired. The decision to exclude comes into effect only in the second next academic year.

The Education Decree X is, in no way, the end point in the matter of the quality control. The text of the Education Decree XII[61] inserts a new article, 122bis, that contains a further elaboration of the structure of quality control with regard to educational activities.

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[61] Parliament of Flanders, *Bill containing adaptation of certain educational regulations*, session 1999-2000, June 22, Doc.367 (1999-2000), no. 1.

Article 122bis has three objectives: first, to make a distinction in the arrangement between quality control in education and in research. The test actually is a paraphrase of article 122, paragraph 1 of the University Decree that contains the explicit arrangement with regard to educational activities. The text does not provide an arrangement for an evaluation of research activities. The question arises about the added value of the new text in article 122bis, paragraph 1 of the University Decree.

Second, the text provides a uniform arrangement for the quality control of college and university education by means of collectively established visitation committees, respectively meant for both institutions of higher education. The Explanatory Memorandum states that it is conformable to the spirit of quality control that the search is conducted per training and not per institution.[62] In the same line of thinking, it figures the possibility that universities and colleges together organize one collective search for related training in higher education.[63]

Third, the text stresses the collectivity of the external assessment of the quality of trainings. Contrary to the possibility of individual quality control by an institution itself, which remains the main principle, the external assessment must be performed by one and the same committee if the control concerns the external assessment of one and the same training or a cluster of trainings for all universities that offer this training or this cluster of trainings. The visitation committee should finish the whole of its activities within twenty-four months, including a public report that unites the results of their assessment of each training, cluster of trainings, and related trainings.[64] Further, a university must act upon the results of the quality control provisions in its policy.[65]

Assessment of the University Personnel Function

Connected to the quality control from articles 122 through 124 of the University Decree, and more specifically to the seventh pre-supposed principle, article III.20 of the Education Decree X also inserted a fifth department in Chapter IV in the decree in relation to the evaluation of members of the academic staff.

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[62] *Id.*, p. 10, second column.

[63] Article 122bis, § 4 University Decree, *see also*: *Ibidem*, p. 11, first column.

[64] The stress on the collectivity does not forbid that the universities and colleges cooperate with foreign institutions in matters of quality control. The Explanatory Memorandum states that this method is highly recommended for the assessment of the quality of unique courses to obtain a certain degree of benchmarking. (Id., p. 10, second column and p. 11, first column). Article 122bis, § 5 University Decree.

[65] Article 122bis, § 6 University Decree.

Section 5 – Assessment

Art. 106bis. The university board establishes the rules for the assessment of the performances and the way in which the members of the university personnel function.

At least once every five years an assessment should be performed of the way in which each member of the university fulfilled his or her task during the period under review. The assessment procedure should provide a possibility of appeal involving independent professional authorities and should fully guarantee the rights of the staff member. Contrary to what is stated in the first sentence, every three years after the first designation and after each appointment or promotion, an assessment should be performed.

Should an individual's performances and/or achievements be considered substandard, or "insufficient," a university board can halve the next year of seniority for one year, thus preventing the staff member from advancing to the next salary level. If an individual receives two "insufficient" assessments or three in the course of a professional career, a university board can dismiss the staff member. In such a case, the term of notice should be equal to the minimum term needed for the staff member to be entitled to social security and unemployment benefits. During the period of notice, the staff member is considered to be a temporary worker who can be charged with other duties. Even so, the staff member will receive the standard gross salary for the function he had originally been assigned to.

All first assessments of staff members should be completed by December 31, 2002, at the latest. A university board will submit the assessment procedure that was agreed on to the Government of Flanders. By 2006 at the latest, the Government of Flanders is to make an evaluation of the effects and results of the assessment procedures used by the universities.

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